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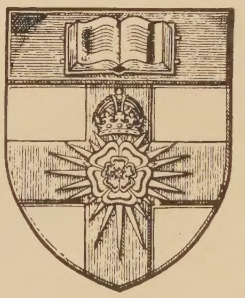

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CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION

AND BY THE

DIVISIONAL COURTS OF APPEAL

FROM

INFERIOR COURTS

XXXIX VICTORIA.

HALL *v.* NOTTINGHAM AND OTHERS. 1875

Custom—Claim by Inhabitants to Recreation in Another's Freehold. *Nov.* 15.

A custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a maypole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, is good.

APPEAL from the county court of Shropshire, holden at Ludlow.

The action was brought against the defendants, parishioners of Ashford Carbonell, in the county of Salop, for trespass on a field called the Maypole Piece, situate in that parish. The defendants justified under the custom set out below. The learned judge found that the freehold was in the plaintiff, and that the land was a piece of glebe land situate in an inclosed field of the plaintiff, which glebe was exchanged in 1780 by the then incumbent of Ashford Carbonell (with the consent of the bishop) with a predecessor of the plaintiff for an equal portion of another field in the

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parish of equal value; that the land had been regularly rated to the poor, and tithe paid and commuted for the same, and that the custom set up by the defendants, and under which they justified, had been for a number of years claimed by the parish and disputed by the owner for the time being of the land. The learned judge being of opinion that the land was subject to a lawful custom for the inhabitants of the parish to erect a maypole on the ground, and dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any times in the year on the land, gave judgment for the defendants. From this judgment the plaintiff appealed.

The question for the opinion of the Court was whether the custom alleged is good in law.

Masterman, for the plaintiff. The custom found is bad, on the ground that it is too general, that it is uncertain, and is not confined to reasonable periods. The effect of it is that it might absolutely deprive the freeholder of the use of his land if a succession of games were to be kept up all the year round. *Millechamp* v. *Johnson* (1) is an authority that a custom extending to all rural sports is bad. The land would be subject to a servitude incapable of judicial control: Lord St. Leonards in *Dyce* v. *Hay*. (2)

Bosanquet, for the defendants. The plaintiff's proposition would, if upheld, amount to the abolition of village greens. *Abbot* v. *Weekly* (3) shews that the custom must be taken, though found generally, to be for seasonable times. *Fitch* v. *Rawling* (4) is an authority that a custom is good which includes all kinds of lawful games, and *Mounsey* v. *Ismay* (5) shews conclusively that there is no necessity to allege the custom at seasonable times. Martin, B., remarked in that case, on the decision in *Bell* v. *Wardell* (6), in the note to which *Millechamp* v. *Johnson* (1) is reported.

Masterman, in reply. The argument on the other side assumes that this is a village green, but the statement in the case is that it is the plaintiff's freehold, and glebe land, inclosed and rated. In *Mounsey* v. *Ismay* (5) the claim was limited to one day in the year and to one sport.

(1) Willes, at p. 205, n.
(2) 1 Macq. 305.
(3) 1 Lev. 176.
(4) 2 H. Bl. 393.
(5) 1 H. & C. 729; 32 L. J. (Ex.) 94.
(6) Willes, 202.

5 H & C 9 Jur NS 366

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KELLY, C.B. I own to having entertained some doubt in this case; because if we hold the custom good, it may have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, and we ought therefore to require some clear and distinct authority before we hold anything which would produce such a consequence. The matter comes to be a question of authorities; but among these there appears to be an irreconcileable difference. On the one hand we have the cases of *Abbot* v. *Weekly* (1), and *Fitch* v. *Rawling* (2), and on the other the case reported in the note to *Bell* v. *Wardell.* (3) In the latter case it was held that a custom for all the inhabitants of the town for the time being to have and enjoy the liberty and privilege of playing at any rural sports or games in a close every year, at all times of the year, at their will and pleasure, was a bad custom. It was not so held on the ground that the expression "at all times of the year" was too general, for that expression was held not to mean more than at all seasonable times; but only on the ground that the custom as laid down was too general. Some sports may occupy the whole surface of the land, and thus this custom might take that entire surface out of the possession of the owner at all times. This I take to be the ratio decidendi in that case; but, on the other hand, we have *Abbot* v. *Weekly* (1) and *Fitch* v. *Rawling.* (2) In the first of these it was held that the dancing there mentioned might be held at all times of the year, and, taking the two cases together, they shew that all lawful games and pastimes may be used at all times. I think we ought to give effect to these authorities, as being of more weight than that on the other side, and therefore our judgment must be for the defendants, and the appeal must be dismissed.

CLEASBY, B. I am of the same opinion. The one question submitted to us is whether the custom alleged can have a legal existence. I believe the proper meaning of the word "custom," as applied to a matter of this description, is something that has the effect of local law, but the general law puts a limit on that, and requires that it shall be reasonable and certain. Now, with

(1) 1 Lev. 176. (2) 2 H. Bl. 393.
(3) Willes, 202.

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respect to the custom in this case being reasonable, it is unnecessary to do more than refer to the two cases cited, *Abbot* v. *Weekly* (1) and *Fitch* v. *Rawling* (2), with which the case of *Millechamp* v. *Johnson* (3) to some extent agrees, and we have, further, the authority of Lord Campbell in *Race* v. *Ward*. (4) Here, however, another objection is put forward, and we are to determine whether we are justified in saying this is so uncertain as to be bad. Looking to the nature and origin of such customs, it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right. If at the present time the inhabitants all met to discuss and determine such a matter, it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have. I cannot myself see, independently of authority, that there is anything so uncertain in this alleged custom that we are bound to reject it. No doubt the case of *Millechamp* v. *Johnson* (3) is to the effect that a custom to enjoy "any rural sports or games" was bad, as too general and uncertain; but in that case the words are very general, while on the other hand, the only distinction between the case of *Fitch* v. *Rawling* (2) and the present is that in the former the custom is specified to be enjoyed at seasonable times; but it has been held that this must be taken to be the case where the more general allegation claiming the use at all times is used. I think, therefore, with my Lord, that we should not go against these authorities in a direction to limit the rights and enjoyment of the public.

AMPHLETT, B., concurred.

Judgment for the defendants.

Solicitors for plaintiff: *Abbott & Co., for C. J. Bowles, Ludlow.*

Solicitors for defendants: *Pownall, Son, Cross, & Knott, for H. T. Weyman, Ludlow.*

(1) 1 Lev. 176
(2) 2 H. Bl. 393.
(3) Willes, p. 205, n.
(4) 4 E. & B. 702; 24 L. J. (Q.B.) 153.

Jur. Rd. 704

BROWN *v.* BRINE, EXECUTOR. 1875

Contract—Illegal Consideration—Promise not to expose Misconduct of Plaintiff —Public Policy. Nov. 23.

To an action on a bond against the defendant as executor, he pleaded that the plaintiff had seduced and committed adultery with the wife of the defendant's testator, between whom and the plaintiff it was agreed, that in consideration that the defendant's testator would not expose and make public the conduct of the plaintiff, he would not sue on the bond. On demurrer to the plea:—

Held, that there was no valid consideration for the agreement, and that the plea was bad.

DECLARATION against the defendant as executor of Henry William Brine on a bond under his seal.

Plea for defence on equitable grounds, that, before the making of the bond in the declaration mentioned, the plaintiff had seduced and committed adultery with the wife of Henry William Brine, and that, after the making of the bond and before the commencement of this suit, the plaintiff promised Henry William Brine, and it was mutually agreed by and between them, that if Henry William Brine should not and would not expose and make public the conduct of the plaintiff with regard to the seduction and adultery, he, the plaintiff, would not enforce payment of the penal sum in the bond or any part thereof or any money thereby secured, or sue for the same. Allegation, that in pursuance and performance of the agreement, Henry William Brine, deceased, did not, during his lifetime, expose or make public the conduct of the plaintiff with regard to the seduction and adultery; but, relying upon the promise of the plaintiff, faithfully performed his part of the agreement; further allegation, that the defendant had not, since the death of Henry William Brine, and while executor, exposed or made public the conduct of the plaintiff.

Demurrer and joinder.

Nov. 15. *Kingdon, Q.C.*, for the plaintiff. There are two objections to the plea. The agreement alleged in it is against public policy, and, further, the plea is pleaded in bar, though it operates only as a suspension of the right of the plaintiff to sue

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during the time the deceased should abstain from exposing him. This is the subject only of a cross action. [He referred to *Gipps* v. *Hume.* (1)]

Edwards, Q.C. (*Goddard,* with him). It is not immoral that a person should abstain from using the right of divorce, though it may be against public policy that proceedings once instituted, as in *Gipps* v. *Hume* (1) should be compromised; though the contrary was decided before the Divorce Act, in *Wilson* v. *Wilson.* (2) If this were an application to the Court of Chancery to restrain the action there would be good ground for a perpetual injunction: *Hunt* v. *Hunt.* (3)

Kingdon, Q.C., in reply. The agreement is against public policy in two respects; in the first place, because it would deprive people of the opportunity they would have of declining to associate with the plaintiff, and, secondly, on the ground that the legislature has provided a remedy for misconduct of this kind, and has taken care that the administration of it shall be under control; the effect of allowing such an agreement would be, that any party might take the matter into his own hand, and this would lead to collusion and fraud of a serious nature.

Cur. adv. vult.

Nov. 26. The following judgments were delivered:—

KELLY, C.B. I am of opinion that the plaintiff is entitled to the judgment of the Court. The consideration for the promise, as alleged in the plea, is that the deceased would not expose and make public the commission of the crime of adultery which the plaintiff had committed with his wife. I think that it is the breach of a moral duty to declare a man guilty of a crime unless upon a justifiable occasion. Such a declaration or statement in writing, even if true, would be a libel, and subject the author of it to an indictment, unless the publication could be shewn to be lawful, as having been made upon a justifiable occasion, or in the ordinary course of a prosecution for an offence against the law. And if this be so, inasmuch as the publica-

(1) 2 J. & H. 517; 31 L. J. (Ch.) 37. (2) 14 Sim. 405.
(3) D. F. & J. 221; 31 L. J. (Ch.) 161.

tion, not upon any justifiable occasion, that the plaintiff had been guilty of adultery, would have been the breach of a moral duty by the deceased, I am of opinion that the forbearance to commit such a breach of duty cannot be made the consideration for a promise, either to pay a sum of money or to release a debt. The consideration therefore failing, the promise is void and the plea is bad in law.

The case before Wood, V.C. (1), shews that a bond conditioned for the payment of a sum of money, in consideration of giving up and abandoning a petition for a divorce on the ground of adultery, cannot be enforced by the obligee. This shews that a forbearance to sue for a divorce with justifiable cause is no consideration for a promise to pay money. Thus, the forbearance to publish with justifiable cause being no consideration, a fortiori such forbearance, where there is no good cause, cannot support a promise.

The plaintiff is therefore entitled to the judgment of the Court.

CLEASBY, B. I am of the same opinion, and will only add a few words. The consideration for the promise to give up a bond must either be a benefit to the promisor or some prejudice to the promisee. What is the benefit in this case? It is the benefit derived from the deceased keeping certain events secret, and that is the same thing as depriving the public of the knowledge of the truth, and of the opportunity of acting upon it. It is only, therefore, a benefit to the plaintiff so far as it would be material to the public to know the circumstances. If that is wholly immaterial, then there is no consideration at all; if it is material, then the public ought not to be deprived of it as a matter of bargain which is to be held to confer a legal right. The case of *Pool* v. *Bousfield* (2) has some bearing upon the validity of such a consideration. In that case the consideration was the not further prosecuting an application to the Court to compel an attorney to answer the matters in an affidavit. That case, though not actually in point, has this resemblance to the present, that the object was to prevent the disclosure of certain matters affecting the character of the promisor; and although, so far as regards any redress

(1) *Gipps* v. *Hume*, 2 J. & H. 517; 31 L. J. (Ch.) 37. (2) 1 Camp. 55.

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which the plaintiff might look for from the application, the agreement was perfectly legal, Lord Ellenborough held the agreement to be corrupt and invalid. It is, no doubt, an important feature in that case that the defendant was an attorney, and therefore an officer of the Court; and I only refer to it as bearing some resemblance to the present case. The conclusion I have arrived at in the case we are now considering is founded on general principles. The plea is, in my opinion, bad; and our judgment must be for the plaintiff.

AMPHLETT, B., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton, for Thomas Floud, Exeter.*

Solicitors for defendant: *Peacock & Goddard.*

Nov. 26.

GAMBLES AND OTHERS *v.* THE OCEAN MARINE INSURANCE COMPANY OF BOMBAY.

Ship and Shipping—Policy of Insurance—Insurance on Voyage to Port "and for Fifteen Days whilst there after Arrival"—Termination of Risk.

A vessel insured "from Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle, and completed the discharge of her inward cargo. Being chartered to carry a cargo of coals to Gibraltar, she received a small quantity as stiffening, and was moved to a loading-place on the river Tyne, within the port of Newcastle, to complete her loading. While moored there the vessel, within fifteen days from her original arrival at Newcastle, was injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy:—

Held (by Kelly, C.B., and Amphlett, B.; Cleasby, B., dissenting), that the substantial purpose of the insurance being at an end when the loss occurred, the underwriters were not liable.

Affd by Ct of App post 141.

SPECIAL case stated in an action brought by the plaintiffs on a policy of insurance effected by them with the defendants for the sum of 600*l.*

The ship, valued at 1500*l.*, was insured from the port of "Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival."

The ship left the port of Pomaron under a charterparty, and arrived on the 4th of December, 1873, in safety at Newcastle. On the 13th of December she completed the discharge of her inward cargo within the port of Newcastle.

On that day the ship was chartered to load in the river Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as stiffening, was, on the 15th of the same month, shifted to the Killingnorth Colliery loading-place on the river Tyne, there to complete her loading, and was there well and properly moored, head and stern in a tier, to wait her turn to go under the loading spout.

The loading spout is at Wallsend, which is about four miles from the town of Newcastle, in the parish of St. Nicholas, Newcastle, and is within the port of Newcastle, and within the district popularly known by and amongst mercantile men as Newcastle.

On the evening of the last-mentioned day it blew heavily from the westward, and for better security, at about 11 p.m., a bower anchor was let go under foot, and the chain ranged upon deck clear for running. On the morning of the 16th the wind increased to hurricane force, and at about 4 a.m., owing to its irresistible violence, the mooring-post on the quay, to which the ship's head-moorings were secured, broke, causing her to become adrift forward and likely to capsize. Thereupon the stern-moorings was instantly cut to facilitate the ship swinging to her anchor, but, notwithstanding this, she quickly capsized, filled, and sank on the same day and alongside the quay.

The ship was subsequently raised, but was found to be very seriously damaged, and the plaintiffs sustained very considerable loss and expense.

It appeared by the policy, which was attached to the case, that the stamp on it amounted to 3*s.*, being at the rate of 3*d.* per cent. for the voyage and 3*d.* per cent. on a time policy.

The question for the opinion of the Court was, whether the plaintiffs, under the above circumstances, were entitled to recover against the defendants under the policy of insurance in respect of the loss.

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Nov. 17. *Gully*, for the plaintiffs, contended that the loss was covered by the insurance, having taken place within the fifteen days agreed upon by the parties to the policy.

Cohen Q.C. (*J. H. Crawford* with him), for the defendants. The question is, whether a new voyage having been commenced there was not an alteration of risk analogous to a deviation. The insured voyage was completed, and the policy was not intended to cover the new risk. The Court ought to carry out what can be collected from the policy to be the intention of the parties, and for that purpose to construe it fairly and liberally: *The Teutonia.* (1)

Gully, in reply. If the phrase has, by the custom of merchants, some other than its natural meaning, that is a question of fact; but what the Court is asked to do here is, as a matter of law, to read in the words, "or until the vessel shall have finished her loading, whichever shall first happen."

[KELLY, C.B. Have you considered the cases of *Williams* v. *Shee* (2) and *Hammond* v. *Reid* (3), and the class of cases that turn on deviation?]

To import that consideration would be to treat the agreement, as to the insurance lasting for fifteen days, as having reference only to a risk on the cargo. Deviation means the incurring a risk which the parties have not agreed on: here the agreement covered the risk, and the loss is within the policy.

Cur. adv. vult.

Nov. 26. The following judgments were delivered:—

KELLY, C.B. The loss in question is certainly within the literal terms of the condition in the policy, having occurred within fifteen days after the arrival of the ship at Newcastle. But the insurance, even if the policy be deemed a time policy, is, "at and from the port of Pomaron to Newcastle, and for fifteen days whilst there after arrival." It is, therefore, an insurance for that voyage; and it appears to me that, when the cargo was discharged, the voyage was complete and at an end; and although the

(1) Law Rep. 4 P. C. 171. (2) 3 Camp. 469.
(3) 4 B. & Ald. 72.

ship might within the policy have remained for the whole fifteen days in the port of Newcastle, the proceeding to another part of the port, and there taking on board a portion of a cargo for a new voyage, was in effect the beginning of a new voyage, and a deviation, being foreign to the purposes for which the port of Newcastle might be used for the voyage insured.

The cases of *Williams* v. *Shee* (1) and *Hammond* v. *Reid* (2) (and vide Arnould on Insurance, 4th ed. p. 443) appear to me to establish the principle, that it is a deviation to resort to or to use the ship, within a port covered by the policy, but for purposes unconnected with the voyage insured.

I think, therefore, that the taking the coals on board at the part of the port in question was as much a deviation as if the ship, after the taking goods on board for a new voyage, had sailed upon such voyage several miles down the river, and been lost within a few yards of its mouth, but within the limits of the port of Newcastle.

It was contended at the bar that this was a time policy, and it appeared that it bore the stamp required for a time policy. But if this were so, it was still a policy upon a voyage from Pomaron to Newcastle, and the taking of a cargo, or part of a cargo, on board for another and a different voyage, was as much a deviation as if, upon a time policy for a year upon voyages between Dover and Newcastle, the ship had gone to Calais and taken a cargo on board there.

I think, therefore, that our judgment must be for the defendants; and my Brother Amphlett concurs in this opinion.

CLEASBY, B. I cannot agree in the conclusion arrived at by my Lord, because I think the language of the policy is quite clear, and I do not see any reason why the Court should depart from it. The language of the policy is "from Pomaron to Newcastle-on-Tyne." That is an ordinary voyage policy; but then it goes on, "and for fifteen days whilst there after arrival." I consider that to be a time policy. Our attention was called, in the course of the argument, to the fact that this policy is stamped as a voyage policy and a time policy expressly. Therefore you have first,

(1) 3 Camp. 469. (2) 4 B. & Ald. 72.

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a voyage from Pomaron to Newcastle, which would be subject to deviation, and the usual considerations affecting voyage policies, and then come the words "fifteen days whilst there after arrival," which, I think, plainly constitute a time policy for fifteen days. Those words are not affected, in my opinion, by the fact that there is in the same document an assurance for a voyage policy. I cannot hold this as only intended to cover the time occupied in discharging the cargo, but, so far as any lawful engagement was concerned, to give the assured the benefit of the policy for a period of fifteen days, however employed, whether in doing nothing, or in preparing his vessel for another cargo, or in removing to another part of the port, or taking in cargo for another voyage. It appears, in this case, that what took place was that the captain, having cleared his previous cargo in order to get another, has to go to a place where ships remain in tiers and take their turn at the stage, but in order to clear the port, as he had discharged his cargo, it was necessary his vessel should be stiffened. Instead of ballast, he took two keels of coal on board. Of course he would not take them out afterwards, and they would form part of his future cargo. It appears to me immaterial whether he went in ballast or in coals; the act remains the same; he is lawfully engaged in the ordinary work in which a man would be engaged in that port. During the fifteen days while he was there waiting for his turn at the stage, the weather was such as to cause the loss which has given rise to this action. I cannot myself understand why this case should be regarded differently from time policies generally. It is quite plain, on time policies, the risk incurred is entirely independent of the voyage of the ship, and the policy covers any voyage whatever which the ship may make, and any loss or damage she may sustain by the perils insured against within the space of time limited in the policy. I am reading from p. 349 of Mr. Arnould's work on Insurance, the 4th edition. My learned Brothers think this is not a time policy, in which case the argument as regards those fifteen days is simple and complete; but I cannot agree with them. I think it is clearly a time policy, and therefore the nature of the risk is immaterial, and that being so, as the loss occurred during the time

covered by the policy, and by reason of the perils assured against, the assured are entitled to recover.

Judgment for the defendants.

Solicitor for plaintiffs: *W. W. Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Freshfields & Williams.*

BEESTON *v.* BEESTON.

Nov. 22.

Wagering—Cheque given for Share of Winnings—8 & 9 *Vict. c.* 109, *s.* 18.

To a declaration on a cheque, the defendant pleaded that he had delivered the cheque to the plaintiff in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering, whereby it was agreed that the plaintiff should pay the defendant certain moneys, and that the defendant should employ them and certain moneys of his own in making bets and wagers upon the result of certain horse races, and should pay to the plaintiff a certain proportion of the winnings, and that, except as aforesaid, there was no consideration for the cheque. On demurrer:—

Held, that the plea was bad, as the plaintiff was not seeking to recover on any contract or agreement by way of gaming or wagering void under 8 & 9 Vict. c. 109, s. 18.

DECLARATION on a cheque drawn by the defendant in favour of the plaintiff on the Wilts and Dorset Banking Company and dishonoured, and on the common indebitatus counts.

Third plea; as to the first count, and so much of the plaintiff's claim under the money counts as related to money alleged to be due upon accounts stated, that the defendant made and delivered the cheque or order to and the same was received by the plaintiff for and in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering—that is to say, a contract whereby it was agreed between the plaintiff and the defendant that the plaintiff should pay certain moneys to the defendant, and that the defendant should employ and use such moneys, and certain moneys of his own, in making and laying bets

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and wagers upon the result of certain horse races, and that the defendant should, subject to certain terms and conditions agreed upon between the plaintiff and the defendant, pay to the plaintiff a certain proportion of such sums as he should win by betting and wagering on the horse races with the said moneys, and the money so alleged to be due on the contract, and in respect of which the cheque or order was given, and the accounts stated, was money alleged to have been won upon the said bets and wagers, and, except as aforesaid, there never was any value or consideration for the making or payment of the cheque or order, or stating the accounts, by the defendant.

Demurrer and joinder.

Purvis, for the plaintiff. The plea is bad. The question turns on 8 & 9 Vict. c. 109, s. 18. (1) Betting in itself is not illegal, *Fitch* v. *Jones* (2), *Knight* v. *Cambers* (3); nor is betting on a horse race, *Johnson* v. *Lansley*. (4) In that case one of two persons received money in respect of bets made by them jointly on a horse race, and gave a bill to the other accepted by a third person who was sued; the statute was held to be no bar to the action, and the case is directly in point. It is immaterial that the plaintiff was privy to the original transaction, for money has been received to his use, as in *Tenant* v. *Elliott* (5), which he is entitled to receive.

W. Graham, for the defendant. This is an attempt to enforce a contract prohibited by statute. The contract was that the defendant should bet and pay the proceeds to the plaintiff. The plaintiff could not have recovered the money independently of the note, and therefore it was given without consideration. This is not like the case of *Sharp* v. *Taylor* (6), where the distinction

(1) 8 & 9 Vict. c. 109, s. 18: "That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

(2) 5 E. & B. 238; 24 L. J. (Q.B.) 293.

(3) 15 C. B. 562; 24 L. J. (C.P.) 121.

(4) 12 C. B. 468.

(5) 1 B. & P. 3.

(6) 2 Ph. 801.

is drawn between enforcing illegal contracts and asserting title to money which has arisen from them; for here the object of the statute was to prevent one of the mischiefs arising from gaming —namely, the employment of one person to bet for another. If this contract is to be held good, it would be good as to money which the defendant had won, whether he had received it or not.

Purvis was not heard in reply.

CLEASBY, B. I think the argument for the plea that the section in question applies to the relation that exists between the plaintiff and the defendant fails. It is impossible to argue that betting on horse races is illegal in the sense of tainting any transaction connected with it. By the statute certain contracts or agreements are made void, but not illegal. Now the cause of action here, whether on the cheque or on accounts stated, is that the defendant has received money for which he ought to account, because he has agreed to do so. Why is he not bound to account? It is said that the statute prohibits such an agreement as the present, but all that it professes to deal with are contracts for wagering. The case of *Johnson* v. *Lansley* (1), in which the transaction occurred after the passing of this statute, does not seem to me to be distinguishable. In that case the only consideration for the bill transaction between the plaintiff and his partner was that the latter had received money, which, as Maule, J., said, he was bound to account for to the plaintiff. There can be no distinction arising from the fact that in this case it was not known to the person with whom the bet was made that the plaintiff and the defendant were interested. I think, therefore, that this is not an attempt to recover under a contract by way of wagering, and that the plaintiff is not precluded from recovering, and that the plea is bad.

POLLOCK, B. I am of the same opinion. There was money in the hands of the defendant belonging to the plaintiff, and, therefore, good consideration for the bill. The statute is directed against suits brought for recovering on any contract by way of

(1) 12 C. B. 468.

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wagering. That applies to actions brought by one party to a wager against the other, or by either party against the stakeholder. The only thing to be said on the other side is that this being a pre-arranged plan, such betting as was in contemplation was illegal, but it was not so at common law, nor by 9 Anne, c. 14, nor 5 & 6 Wm. 4, c. 41, because those statutes only apply to securities between the parties wagering, and the statute 8 & 9 Vict. c. 109, only makes such contracts null and void, and not illegal, as is clearly expressed in *Fitch* v. *Jones*. (1)

AMPHLETT, B. I am of the same opinion. There was nothing illegal in the contract, as stated in the plea. *Sharp* v. *Taylor* (2) goes further than is necessary for the decision of this case, for there the Lord Chancellor decided on the ground that the transaction alleged to be illegal was completed and closed, and would not be affected by what the Court was asked to do between the parties. I do not think it is necessary to say whether the defendant could keep the money in his pocket if he won, but I agree that while the statute makes a security given for payment of a bet void, that is not the case here, and the plaintiff is entitled to recover.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. T. Luscombe.*

Solicitors for defendant: *Monckton, Long, & Co,*

(1) 2 Ph. 801.

(2) 5 E. & B. 238; 24 L. J. (Q.B.) 293.

Jur. N.S. 854.

[IN THE COURT OF APPEAL.]

1875
Nov. 15.

COPIN *v.* ADAMSON.

Foreign Judgment—Liability of English Shareholder in a Foreign Company—Effect of taking Shares—Agreement to submit to Jurisdiction—Service of Notice at elected Domicile.

To a declaration claiming a sum recovered by a judgment in a French Court, the defendant pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French Court, or served with any process or summons in the suit, nor did he appear therein; nor had he any notice or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself.

Replication, that the defendant was the holder of shares in a company having its legal domicile in Paris, and thereby became subject to all the liabilities, rights, and privileges attaching or belonging to shareholders, and in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen. That the company became bankrupt, and by the law of France the amount unpaid upon the defendant's shares became payable to the plaintiff as the company's assignee in bankruptcy; that the defendant made default, and provoked a contest; that he never elected a domicile; that the plaintiff thereupon caused a summons to be served at the office aforesaid, which summons required the defendant to appear in the said French Court to answer the plaintiff's claim; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon the plaintiff recovered judgment by default against him for the amount unpaid on his shares:—

Held (affirming the judgment of the Court of Exchequer), that the replication was good, although it did not allege that the defendant ever had any notice or knowledge of the statutes or articles, or of their provisions.

DEMURRER to a replication.

For the present purpose the pleadings are sufficiently set out in the head-note. They are fully stated in the report of the case below (1), from which it will be seen that the Court of Exchequer

(1) Law Rep. 9 Ex. 345.

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(Kelly, C.B., Pigott and Amphlett, BB.), gave judgment for the plaintiff upon a demurrer to the replication now in question; and Pigott and Amphlett, BB. (Kelly, C.B., dissenting), gave judgment for the defendant upon a demurrer to the second replication, as to which no question now arises.

Error was brought in respect of the judgment upon the first replication alone.

R. E. Webster (*H. Matthews, Q.C.*, with him), for the defendant. If the replication is read to mean that the defendant as shareholder *agreed* to be bound by the statutes or articles relating to the election of a domicile and service of process at an implied domicile, the replication is undoubtedly good; but it cannot bear that construction, for it does not allege that he ever had any knowledge whatever of the statutes or articles, or those provisions. No contract by the defendant is averred; the only allegation is that by the law of France the defendant was bound by the statutes, because he was a shareholder, and that is not sufficient. No doubt, if the principle established by *Vallée* v. *Dumergue* (1), is law, this replication is good, but this Court can overrule that decision. Moreover, the statutes provide that service at the implied domicile shall be valid and effectual, but not that all other service shall be dispensed with. The present defendant never had any notice of any kind of the proceedings in the French suit. [He also referred to *Schibsby* v. *Westenholz* (2), and *Godard* v. *Gray*. (3)]

Benjamin, Q.C., Holl, and *S. Hastings,* for the plaintiff, were not called on.

LORD CAIRNS, L.C. The replication appears to me to amount to this, that the defendant was a shareholder in a French company; that the statutes and provisions of that company which, in point of fact, were agreements inter socios, provided, among other things, that every shareholder between whom and the rest of the company, or the representatives of the company, litigation should arise, should choose a domicile in Paris, and, if he did not, the public office there

(1) 4 Ex. 290; 18 L. J. (Ex.) 398. (2) Law Rep. 6 Q. B. 155.
(3) Law Rep. 6 Q. B. 139.

should become his domicile pro hac vice, and service of all proceedings at that domicile should be good service. The replication goes on to represent that, by the law of France, a person taking shares and becoming an *actionnaire* in the company, was bound by all the statutes and provisions of the company. The question might arise, whether, without any express averment, by the law of France as by that of every civilized country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder. But that question does not arise here, and I say nothing further about it. The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer have held that a good replication. I am clearly of the same opinion. It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant; and that, if it were necessary to bring an action against him on the part of the company, the service of the proceedings at the office of the imperial procurator, if no other place were pointed out, would be good service. Therefore, the appeal from the judgment of the Court below on the demurrer must fail.

It thus becomes unnecessary to consider the points raised with regard to what took place at the trial (1), and the appeal upon the rule must be dismissed with costs.

BLACKBURN and BRETT, JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Deane, Chubb, & Co.*
Solicitors for defendant: *Miller & Wiggins.*

(1) The cause was tried at the Guildhall sittings after Hilary Term, 1874, before Kelly, C.B., when a verdict was found for the plaintiff for the amount claimed. A rule nisi was afterwards obtained pursuant to leave to enter a nonsuit or a verdict for the defendant, or for a new trial upon several grounds. This rule was discharged by the Court of Exchequer on the 8th of May, 1874, having been argued together with the demurrers. From this decision also the defendant appealed, but the questions raised by the rule became immaterial after the decision of the Court of Appeal upon the demurrer, all the allegations in the replication having been proved at the trial. The decision of the Court of Exchequer, discharging the rule, was affirmed, and the verdict therefore stands for the plaintiff.

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Nov. 26.

ELEY *v.* THE POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED.

Company — Articles of Association — Appointment of Solicitor — Statute of Frauds — Contract not to be performed within a Year — Signature to Articles.

Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company for the usual and accustomed fees and charges, and should not be removed from his office unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff was not appointed solicitor to the company by any resolution of the directors, nor by any instrument bearing the corporate seal of the company, but he acted as such for some time. No resolution as to his ceasing to be solicitor was ever passed by the directors, but after a time they ceased to employ him, and employed other solicitors to do the legal business of the company.

The plaintiff brought an action against the company for breach of contract in not employing him as solicitor, to transact their legal business, on the terms of the articles:—

Held, by Cleasby and Amphlett, BB., that the articles of association were a contract between the shareholders inter se, and did not create any contract between the plaintiff, who was not a party to them, and the company.

Held, also, by Kelly, C.B., Cleasby and Amphlett, BB., that, even if such a contract as the plaintiff alleged had been entered into, it would be a contract not to be performed within a year, and must, therefore, be in writing, and that the signatures to the articles of association, which were affixed alio intuitu, were not signatures to a memorandum of the contract within the Statute of Frauds, so as to bind the company.

On an award stated in the form of a special case the following facts appeared:—

In the year 1869, one Baylis, who was endeavouring to form a joint stock insurance company upon a new principle, applied to the plaintiff to make advances to the extent of 200*l.* to meet the expenses of getting up and forming such a company, and it was arranged between the plaintiff and Baylis that, in the event of the plaintiff making such advances and the company being formed, the plaintiff should be appointed permanent solicitor to the company. The defendant company was formed, and the plaintiff made advances to the extent of 200*l.* The money was paid to

Baylis, and by him applied to purposes of the company. The last of the advances was made in May, 1870.

The memorandum and articles of association of the company were prepared by the plaintiff and signed by seven persons, each holding five shares, and were duly registered on the 27th of January, 1870, pursuant to the Companies Act, 1862.

Clause 118 of the articles of association was as follows:—

"Mr. William Eley, of No. 27, New Broad Street, in the City of London, shall be the solicitor to the company, and shall transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office except for misconduct."

In December, 1870, the company allotted to the plaintiff 200 shares, and the plaintiff accepted the same in repayment of his advances, and so became, and has ever since been, a member of the company.

From the time of the incorporation of the company down to the latter end of 1871 the plaintiff was employed by the company as their solicitor, and transacted all their legal business except some which was transacted by a firm of solicitors in Manchester in or about October, 1871, and which formed the subject of a correspondence between the plaintiff and the directors, to which it is unnecessary to advert further than to state that the plaintiff insisted upon his right to be employed as the sole solicitor of the company, and to transact all their legal business unless he misconducted himself; but he intimated that he would not stand upon what he considered his strict right as regarded the business which had been so transacted by the Manchester firm. The directors, on the other hand, insisted that the plaintiff was in error, and that he had no such rights as he alleged.

On the 2nd of February, 1870, at a meeting of the directors, a resolution was passed appointing Mr. Baylis permanent out-door manager of the company, subject to removal only on breach or neglect of duty, at a certain annual salary, and with a commission. In the minute of the proceedings at that meeting there is the following entry: "Mr. Eley, solicitor to the company, present."

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No resolution was ever passed by the directors appointing the plaintiff as solicitor to the company, neither was he ever appointed as such at any meeting of the company, nor by any instrument bearing the corporate seal of the company.

Early in the year 1871 the directors published a prospectus of the company, in which the plaintiff's name was inserted under the head "Solicitor."

Subsequently they published other prospectuses, in all of which, under the head of "Solicitors," several names appeared, but the plaintiff's name appeared in two only.

The plaintiff from time to time protested against the appointment of any person besides himself as solicitor of the company, nevertheless the company, by their directors, in and after January, 1872, employed several of the persons whose names appear on the various prospectuses to transact legal business for them, but they had not employed the plaintiff to transact any business for them since the year 1871.

The first count of the declaration stated that it was agreed by and between the plaintiff and the defendants that the plaintiff should be employed by the defendants as, and appointed by the defendants to the office of, solicitor of the company upon the terms that the defendants would, so long as the plaintiff should continue to act as and hold the office of solicitor of the company, employ the plaintiff to transact all the legal business of the company for the usual and accustomed fees and charges, and that the plaintiff should not be removed from his office unless for misconduct. Averments that the plaintiff in pursuance of this agreement became and was employed by the defendants, and entered upon his office as the solicitor of the company upon the terms aforesaid, and was ready and willing to perform the agreement on his part; and of performance of conditions precedent. Breach, that the defendants refused, whilst the plaintiff was solicitor of the company, to employ him as such solicitor as aforesaid, and to suffer and allow him to transact the legal business which the defendants needed to have done and performed, and employed other solicitors to transact the same.

The question for the opinion of the Court was, whether, upon

the facts and documents, there was any evidence to support this count of the declaration.

Nov. 10. *D. Kingsford,* for the plaintiff. If the clause of the articles was an actual appointment of the plaintiff, the agreement averred in the declaration is supported by evidence. By the Companies Act, 1862, s. 16, the articles bind the company as if each member had signed; and the case of *Orton* v. *Cleveland Fire Brick and Pottery Co., Limited* (1) shews that the company might make this contract. This is not the case of an authority to enter into a contract given by the articles, but of the actual contract contained in them: *Appletreewick Lead Mining Co.* (2); *Lord Claud Hamilton's Case.* (3) Even if the article is not in itself a contract, the plaintiff was employed on the terms of it.

Finlay (*Day, Q.C.,* with him), for the defendants. The contract declared on is not that in the articles. In the latter case the company, if liable, would be liable once for all for dismissing the plaintiff. In the former it would render them open to actions from time to time for not sending him work. The articles will not in themselves constitute a contract between the company and third parties, as they relate only to the relations of the members inter se. *Melhado* v. *Porto Alegre Ry. Co.* (4) is conclusive on this point; see also *Pritchard's Case.* (5) Further, there is no evidence from which it can be inferred that the plaintiff was employed on the terms of the article. To prove that, the plaintiff would have to shew that, when he was employed by the directors, they had in view that he was their permanent solicitor under this article. Supposing the company had sued the plaintiff for refusing to do some work, could they have recovered? Lastly, the contract alleged is one of a permanent nature, which requires a memorandum in writing within the Statute of Frauds: *Boydell* v. *Drummond* (6); *Birch* v. *Earl of Liverpool* (7); and notes to *Peter* v. *Compton.* (8)

Kingsford, in reply. The articles signed by the subscribers are a sufficient memorandum. The Companies Act, 1867, s. 37,

(1) 3 H. & C. 868.
(2) Law Rep. 18 Eq. 95.
(3) Law Rep. 8 Ch. 548.
(4) Law Rep. 9 C. P. 503.
(5) Law Rep. 8 Ch. 956.
(6) 11 East, 142.
(7) 9 B. & C. 392.
(8) 1 Sm. L. C. 335, 7th ed.

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provides various ways in which directors may contract, but these are in addition to the ordinary ways: *Wilson* v. *West Hartlepool Harbour and Ry. Co.* (1) Further, the employment of the plaintiff so long as he conducts himself well is not necessarily continuous. *Knowlman* v. *Bluett* (2) is an authority that this is not an agreement not to be performed within a year.

Cur. adv. vult.

Nov. 26. The following judgments (3) were delivered:—

AMPHLETT, B. In this case the plaintiff, a solicitor, by the first count in his declaration alleged that it was agreed between him and the defendants, who are a company registered under the Joint Stock Companies Act, 1862, that he should be employed by the defendants as, and appointed by the defendants to the office of, solicitor of the company, upon the terms that the defendants would, so long as the plaintiff should continue to act as and hold the office of solicitor to the defendants, employ the plaintiff to transact all the legal business of the company, for the usual and accustomed fees and charges, and that the plaintiff should not be removed from his office unless for misconduct.

On the trial the case was referred to the arbitration of Mr. Manisty, who made his award in the form of a special case, and submitted the following question for the opinion of the Court, viz. "Whether, upon the facts and documents which he had stated or referred to, there was any evidence to support the first count in the declaration?"

These facts and documents I need not detail at length, but so far as is necessary to make clear the grounds of my opinion they were shortly these:—

In the year 1869 one Mr. Baylis was an active promoter of the defendants' company, and prevailed upon the plaintiff to make advances to the extent of 200*l.* to meet the expenses of getting up the company, under an arrangement that, in the event of the company being formed, the plaintiff should be appointed permanent solicitor to the company.

(1) 2 D. J. & S. 475; 34 L. J. (Ch.) 241. 11 Jur. (N.S.) 124.

(2) Law Rep. 9 Ex. 1, and in Ex. Ch. 307.

(3) The judgment of Amphlett, B. was read.

This sum of 200*l.* was advanced at different times by the plaintiff to Mr. Baylis, and by him applied to the purposes of the company. The last of such advances was made in the month of May, 1870, a few months after the incorporation of the company, and in the month of December, 1870, the company allotted to the plaintiff 200 shares of 1*l.* each, which he accepted in discharge of his advance, and has ever since been a member of the company.

The memorandum and articles of association of the company were prepared by the plaintiff, and after being signed by seven persons for five shares each (of whom Mr. Baylis was not one) were duly registered on the 27th of January, 1870, pursuant to the Companies Act, 1862.

The articles contained the following clause (No. 118):—

"Mr. William Eley, of No. 27, New Broad Street, in the city of London, shall be the solicitor to the company, and shall transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office unless for misconduct."

After the incorporation of the company many other persons, besides the seven persons above mentioned, took shares in and became members of the company. The precise time of their becoming members is not stated, nor, in my view, is it material.

From the time of the incorporation of the company down to the latter end of 1871, the plaintiff was employed by the company (no doubt through the directors) as their solicitor, and transacted all their legal business, except some matter transacted by a firm of solicitors at Manchester in or about October, 1871, which formed the subject of a correspondence between the plaintiff and the directors, in which he asserted and they denied his right to be employed as the sole solicitor of the company.

At a meeting of the directors on the 2nd of February, 1870 (being probably their first meeting), a resolution was passed appointing Mr. Baylis permanent out-door manager of the company.

In the minute of the proceedings at that meeting there is the following entry, "Mr Eley, solicitor to the company, present," but no resolution was ever passed by the directors, at that or any other

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meeting, appointing the plaintiff a solicitor to the company, or arranging the terms of his employment. Neither was he ever appointed as such at any meeting of the company or by any instrument bearing the seal of the company.

Early in the year 1871 the directors published a prospectus of the company in which the plaintiff's name was inserted under the head "solicitor."

Subsequently, in the same year, they published another prospectus in which the name of the plaintiff and a firm at Manchester were inserted under the head, "solicitors."

In 1872 they published two other prospectuses in which several names appeared under the head "solicitors," but not the plaintiff's.

Subsequently, in the same year, they published two other prospectuses in which, under the head of "solicitors," the plaintiff's name appears, along with the names of several other solicitors.

The plaintiff from time to time protested against the appointment of any person other than himself as solicitor of the company. Nevertheless the company, by their directors, in and after January, 1872, employed several of the persons named in the prospectuses, but they have never employed the plaintiff to transact business for the company since 1871.

The present action was commenced on the 8th of February, 1873.

Under these circumstances it could not, in my opinion, be successfully contended that the 118th clause of the articles of association created any contract between the plaintiff and the company.

The articles, taken by themselves, are simply a contract between the shareholders inter se, and cannot, in my opinion, give a right of action to a person like the plaintiff, not a party to the articles, although named therein. If authority were wanted for this proposition, the cases cited in the argument, *Pritchard's Case* (1), and *Melhado* v. *Porto Alegre Ry. Co.* (2), are, in my opinion, quite conclusive on the subject; nor is there any room for the application of the doctrine of ratification, since the arrangement between the plaintiff and Mr. Baylis is not noticed in the articles, and is not found in the case to have been at any time communicated or

(1) Law Rep. 8 Ch. 956. (2) Law Rep. 9 C. P. 503.

known to a single shareholder or director, or, except themselves, to any officer of the company.

This being so, and the contract sued upon not being under the seal of the company, it is not binding upon the company, unless it falls within the 37th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), that is to say, unless it was made by the directors under the express or implied authority of the company.

Now it cannot, in my opinion, be denied that such a contract (if in fact entered into) was most improvident and prejudicial to the company. It is one thing to have it stipulated as between the shareholders that the plaintiff should not be removed from the office of solicitor unless for misconduct (a stipulation which might be disobeyed if found inconvenient, without exposing the company to any action, and which, moreover, might at any time be revoked by a statutable majority of the shareholders), but quite another thing to have a binding contract to that effect with the plaintiff, which would irrevocably bind the company to employ the plaintiff as their sole solicitor during the whole of his professional life, unless actual misconduct could be proved against him.

Many cases might be put, in which the prohibition against employing another solicitor might be most inconvenient and, indeed, disastrous to the company. If taken literally, the company could not employ a solicitor to tax the plaintiff's bill or inquire into his personal conduct, without exposing themselves to an action.

Still, considering the very extensive powers given to the directors by these articles, and the enlarged views of the implied powers of directors which the Courts have of late years adopted, I am not prepared to say that such a contract, if in fact entered into by the directors, bonâ fide, would be beyond the scope of their authority, and not binding upon the company; and, at all events, I do not rest my judgment upon it. But, do the facts found by the case prove conclusively (and, undoubtedly, in a case like this between the directors and their solicitor, the strictest proof should be required), that any such special contract was entered into? No written document passed between them, nor is there any entry or notice of such special contract in the minute book of the directors or in any book of the company. All that appears is that the directors allowed the plaintiff to attend their first meeting, and

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afterwards employed him as the solicitor of the company, which, as between themselves and the company, though not as between themselves and the plaintiff, they were bound by the articles to do. But how does that shew that they entered into a special contract with him, that he should not only receive the ordinary remuneration for his services, but transact all the future business of the company, and not be removed from his office unless for misconduct? At the same meeting, when the plaintiff attended as solicitor, and must be taken to have been recognised and employed as solicitor of the company, an entry was made in the minute book of the appointment of Mr. Baylis as permanent out-door manager of the company; why was there not an entry made of this special and most onerous contract with the plaintiff? I think it highly probable that the true explanation is that the plaintiff, who prepared the articles and inserted the 118th clause in his own favour, thought he was safe under the clause itself, and therefore did not think it necessary, and, it may be, for many reasons, not for his own interest, to ask the directors to enter into any such strange and special contract with him. He was, however, in my judgment, mistaken in that respect; but, of course, such mistake cannot create any special contract between him and the company, or between him and the directors. All that can be said is that he intended that the company should be bound hand and foot to himself, but from a mistaken view of the law he has, most fortunately for the company, failed to carry such intention into effect. The act of the directors in employing another solicitor was, no doubt, as between themselves and the company, a violation of the 118th clause; but that might have been condoned by the company, and if the plaintiff, as a member of the company, had called that act into question at a general meeting, I do not think it difficult to guess what the result would have been. For these reasons, I think that there was no contract at all between the plaintiff and the company to the effect stated in the declaration. Moreover, if there was in fact any such special contract, it was at all events a contract by parol only; and it was urged before us by the learned counsel for the defendants that it was a contract not to be peformed within a year, and therefore within the 4th section of the Statute of Frauds, and I have not been able

to see any sufficient answer to that objection. It seems to me that the parties contemplated that the contract should continue to be binding, at least as against the company, during the whole professional life of the plaintiff; and the circumstance that the contract might be determined within the year by the death, or retirement, or misconduct, or at the will of the plaintiff, would not, in my judgment, prevent the operation of the statute. The case of *Roberts* v. *Tucker* (1), and many other cases to be found in the books, establish, I think, that proposition.

The case of *Knowlman* v. *Bluett* (2), cited on this point for the plaintiff, has, I think, no application. There the contract was by a father to pay to the plaintiff an annuity, for so long as she should maintain her illegitimate children by him. The contract was held by the majority of the judges to be revocable by either party, and it was held that the statute was no bar to her recovery of the annuity for the time she actually maintained the children. It is no authority for the proposition that, if the contract had been for the payment of the annuity during the minority of the children, with no power to the father to remove them, it would not have been within the operation of the statute.

It was argued that the articles of association containing the 118th section, being signed by the directors, was a sufficient memorandum or note of the agreement to satisfy the statute. I think there is nothing in that argument. The articles merely regulated the internal affairs of the company, and the signature of the directors (3) was for the purpose of binding them to such regulations, and cannot possibly, in my judgment, be used as evidence of a subsequent parol agreement between them and a third person.

Upon the whole, I think that the question submitted to us by the learned arbitrator ought to be answered in the negative.

CLEASBY, B. I agree in the result arrived at by my Brother Amphlett, but I prefer to confine my judgment to the last points

(1) 3 Ex. 632.

(2) Law Rep. 9 Ex. 1, and in Ex. Ch. 307.

(3) By the 83rd article the first directors were to be appointed by the subscribers of the memorandum of association, and by the 84th, until such appointment, the subscribers were to be deemed to be directors, and were to exercise all the powers of directors.

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raised. I may say that I am of opinion that clause 118 of the articles cannot by itself be taken to operate as a contract between the solicitor and the company. It is said, however, that there is evidence, from what took place subsequently, to shew the existence in point of fact of such a contract. Supposing this to be established, we have to consider whether it is a contract not to be performed within a year within the 4th section of the Statute of Frauds. The statute extends to all contracts not to be finally carried out in a year, but it does not extend to contracts which are to be carried into effect on a contingency. We have then to construe the terms of the 118th article. They are, that the plaintiff shall transact all the legal business of the company, and shall not be removed from the office of solicitor except for misconduct. Was this a matter which was not to be carried into effect in a year? It was intended that he should conduct, as long as the defendants continued as a company, all the legal business which they had to transact; and this seems to me not to be a contract to be carried into effect in the course of a year. The only other question to be dealt with is that as to the signatures to the articles of association. All that the persons who signed did was done with no intention to bind the company to the plaintiff, and, indeed, before any agreement was made between them. We cannot treat that as a signature of a note or memorandum of what was done afterwards, and, therefore, on this point also the plaintiff fails.

KELLY, C.B. I also think the defendants are entitled to the judgment of the Court. I forbear to pronounce any opinion as to whether these articles, with the fact of the subsequent employment, constitute a contract on the terms contained in them, because, were I to so hold, there would be a difficult question behind, whether it was not ultra vires for the directors to attempt to bind the company to employ a solicitor to transact, for all his life, all the legal business of the company. Passing by this, I come to consider the objection raised under the 4th section of the Statute of Frauds. I do not see how any one can doubt that this agreement was not to be performed within a year. It was for the life of the plaintiff, subject to a defeasance on the possibility of his being guilty of some misconduct. But, assuming, as I think we must,

that this was not to be performed in a year, the question arises, whether there is any memorandum or note in writing of it signed by the defendants. The signatures affixed to the articles were alio intuitu, and it can hardly be suggested that the directors had any idea that, in signing the articles, they were signing a note of this contract. In my opinion, therefore, this not being a memorandum of a contract between the company, or the directors on their behalf, and the solicitor, there is nothing to satisfy the statute, and there is no binding contract on which the plaintiff can recover.

Judgment for the defendants.

Solicitor: *The plaintiff in person.*
Solicitors for defendants: *Tucker, New, & Langdale.*

HARRIS *v.* MULKERN AND ANOTHER. *Nov.* 26.

Ejectment—Action for Mesne Profits—Estoppel—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76) *ss.* 180, 207, *sched. A, Nos.* 14, 17.

To trespass for mesne profits the defendants pleaded title to the lands in themselves during the time for which mesne profits were claimed. The plaintiff replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them. On demurrer:—

Held, that the judgment in ejectment did not operate as an estoppel with respect to the duration of the plaintiff's title, and the replication was therefore bad.

To a declaration in trespass for mesne profits the defendants pleaded, 1st, except as to so much of the declaration as related to the trespasses and causes of action which were committed and arose on and after the 3rd of August, 1874, that the messuage and lands were not the plaintiff's as alleged: and, 2nd, except as aforesaid, that before the committing by the defendants of the grievances in the declaration complained of, the plaintiff, by deed, demised the messuage and lands to one George Hill for the term of fourteen years from the 25th of March, 1868, by virtue of which demise Hill entered upon the messuage and lands, and be-

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came possessed thereof for and during the continuance of that term, and before the committing of the grievances as aforesaid, Hill, by deed, dated the 6th of May, 1868, demised the messuage and lands to the defendants, for all the residue of the term of fourteen years, except the last three days thereof, by virtue of which last-mentioned demise the defendants entered upon the messuage and lands, and became possessed thereof for the term last aforesaid: whereupon the defendants, in their own right, committed and did the alleged acts and trespasses.

Replication to these pleas, so far as the same relate to trespasses committed on and since the 25th of December, 1867, that the defendants ought not to be admitted to plead either of them, because on the 3rd of August, 1874, the plaintiff, for the purpose of recovering possession of the messuage and lands, sued out of this Court a writ of ejectment directed to the defendants and one Swann by name, and to all persons entitled to defend the possession of the messuage and lands, to the possession whereof the plaintiff claimed by the writ to have been entitled on and since the 25th of December, 1867, and to eject all other persons therefrom, commanding the defendants and other persons named in the writ, and the persons entitled to defend the possession of the lands or such of them as denied the alleged title of the plaintiff within sixteen days after service of the writ, to appear in this Court to defend the property or such part thereof as they might be advised, in default whereof judgment might be signed, and they turned out of possession, and such proceedings were thereupon had in this Court upon the writ, that, before this suit, by the judgment of this Court, it was considered that the plaintiff should recover possession of the messuage and lands, and afterwards and before this suit, by virtue of such judgment the plaintiff entered into possession of the messuage and lands, and this the plaintiff is ready to verify, &c.

Demurrer to the replication and joinder.

Nov. 17. *Bradford*, for the defendants. The replication is bad. Formerly, no doubt, the judgment in ejectment was an estoppel: *Aslin* v. *Parkin* (1); but that arose from the character of the

(1) 2 Burr. 665.

fictions on which the action was founded. The distinction was pointed out by Cleasby, B., in *Pearse* v. *Coaker* (1), that, under the old practice the judgment was that the plaintiff should recover "the term," and that was evidence of title from the day of the demise, but that now the judgment is merely for recovery not of the term but of the premises. Even under the old form it is submitted that a judgment that the plaintiff should recover the term was not final as to his title to that term. In *Kenna* v. *Nugent* (2) a judgment by default in ejectment under the Common Law Procedure Amendment Act (Ireland), 1853 (3), was held not to be an estoppel.

Finlay, for the plaintiff. There is no difference in the effect of a judgment in ejectment by default and one after appearance. The finding of the jury in the latter case is that the plaintiff is entitled to the possession of the land "as in the writ mentioned:" Common Law Procedure Act, 1852, sched. A, form 17; and the judgment is to have the same effect as a judgment in the action of ejectment formerly in use, s. 207. The question in issue is stated in s. 180, and is whether the statement in the writ of the title of the claimant is true or false. The plaintiff must prove title from the day named in the writ, and the judgment, being founded on his right as from that day, is conclusive. In *Kenna* v. *Nugent* (2) the judgment shews that the issue under the Irish Act is, whether the plaintiff was entitled on the day named in the writ or on any day between that day and the issuing the writ. (4) If the contention of the defendant is right, the judgment is not even primâ facie evidence of title: *Wilkinson* v. *Kirby* (5) is an authority for the plaintiff.

Bradford, in reply. In *Wilkinson* v. *Kirby* (5) the judgment in ejectment was treated as an estoppel from the date of the writ.

(1) Law Rep. 4 Ex. at p. 101.

(2) Ir. Rep. 6 C. L. 547, and in Ex. Ch. Ir. Rep. 7 C. L. 464.

(3) 16 & 17 Vict. c. 113.

(4) The Common Law Procedure Amendment Act (Ireland), 1853 (16 & 17 Vict. c. 113), sched. B, form No. 20, gives the question for the jury thus: "Therefore let a jury try whether the plaintiff was entitled to the possession of the said lands or any part of them, on the said day, or at any time subsequent to such day, and before the commencement of the action, and whether the plaintiff is entitled to any and what damages for loss of mesne rates and profits."

(5) 15 C. B. 430; 23 L. J. (C.P.) 224.

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Here, however, the replication goes beyond that and treats the judgment as an estoppel from the day named in the writ.

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Nov. 26. The judgment of the Court (Kelly, C.B., Cleasby and Amphlett, BB.), was read by

CLEASBY, B. This was an action for mesne profits. The plaintiff had recovered in ejectment against the defendants, upon a writ bearing date the 3rd day of August, 1874, in which he claimed, in conformity with the form of the writ given by the Common Law Procedure Act, 1852, to have been entitled from the 25th of December, 1867.

The defendants had suffered judgment by default in the ejectment, and in the action for mesne profits they paid into Court the amount as from the date of the writ of ejectment; and as to the claim for mesne profits for that portion of the time between the day named in the writ and the date of the writ, they pleaded a plea shewing title to the land in themselves. The plaintiff replied by way of estoppel, setting forth the writ of ejectment and judgment. The question is, whether the defendants are estopped by the judgment from denying the title of the plaintiff during the interval between the 25th of December, 1867 and the 3rd of August, 1874. It is admitted that they can shew that they were not in possession during any part of the term; but the question is whether they can deny the plaintiff's title.

It had been decided that, before the Common Law Procedure Act, upon the old form of declaration, laying the demise by the lessor of the plaintiff and a particular term, the defendant, if judgment went against him, was precluded from denying the plaintiff's title from that time. By the old form of declaration, the plaintiff claimed a certain term in the premises, dating from that day, and the judgment of the Court was that he should recover the term. This judgment bound the defendant, and he could not be allowed to dispute it. It was contended in argument that the judgment only was that the plaintiff should recover the term, and that this was not equivalent to a judgment that he was entitled to the term; but we think there is no ground for this argument,

and that the judgment in ejectment was a binding judgment as to the title and the term between the parties.

It was also considered under the old practice that the judgment was equally binding whether by default or after verdict. It is only necessary to refer to *Aslin* v. *Parkin* (1), and *Wilkinson* v. *Kirby*. (2) We have now to consider what is the effect of the judgment by default in the action of ejectment under the Common Law Procedure Act. By the form of the writ given by the Act, the plaintiff may either claim title from the date of the writ or from some anterior day. This, we think, was no doubt done to enable the plaintiff to make the writ available in the action for mesne profits. In the present case the writ claimed title from some anterior day, as has been already stated.

The course of proceeding now is, that all that the plaintiff claims by the writ is possession of the land, not possession of any term in the land, and that the judgment of the Court, as given by sch. A to the Act, No. 14, is merely that the plaintiff "do recover possession of the land in the writ mentioned." In connection with this it should be noticed that the effect of non-appearance as stated in the writ of ejectment is, that judgment may be signed and the defendant turned out of possession.

The distinction between the present and the former judgment has been already pointed out in the case of *Pearse* v. *Coaker* (3) and in the case of *Kenna* v. *Nugent*. (4) The case in the Irish Court was not a decision bearing upon the present case, because by the Irish Common Law Procedure Act, 1853, a form of issue is given which makes the day from which the title is laid in the writ immaterial, as the form given is to try whether the plaintiff was entitled from that day or from any subsequent day, which is not the case in our proceedings. In our proceedings, if the case went to trial upon such a writ as the present, the question would be, whether the plaintiff was entitled at that time, and the plaintiff would fail unless he proved that title, subject of course to an amendment of the writ: s. 180 of the Common Law Procedure Act, 1852.

(1) 2 Burr. 665.

(2) 15 C. B. 430; 23 L. J. (C.P.) 224.

(3) Law Rep. 4 Ex. at p. 101.

(4) Ir. Rep. 6 C. L. 547, and in Ex. Ch. Ir. Rep. 7 C. L. 464.

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We ground our judgment in the present case, where the strict question of estoppel is raised, upon the distinction between the present form of judgment and the former one. We think that, as the only judgment now is that the plaintiff recover possession of the land, this is only an estoppel as to the plaintiff's title at the time action was brought, and there is nothing in it either expressly or by reference which can make it operate as a complete estoppel with reference to the duration of the plaintiff's title; there is of course another question, to what extent it is evidence.

For the above reasons we think the replication by way of estoppel cannot be supported, and that the demurrer must be allowed, and judgment upon it, for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Denton, Hall, & Barker.*
Solicitor for defendants: *J. P. Poncione.*

Dec. 10.

[IN THE COURT OF APPEAL.]

MACKENZIE *v.* WHITWORTH.

Marine Insurance—Re-insurance—Policy—Interest.

4 C P D. 375

An underwriter who has subscribed an insurance "on goods" may re-insure by the same description, and the policy need not be expressed to be a re-insurance.

CASE stated on appeal, under the Common Law Procedure Act, 1854, from a decision of the Court of Exchequer. (1)

The declaration was on a policy of insurance, dated the 24th of April, 1873, whereby the plaintiff through his agents as well in their own name as for and in the name and names of all and every other person to whom the same did appertain, caused himself and them "to be insured, lost or not lost, at and from New Orleans to Revel . . . . *upon goods* . . . . beginning the adventure upon the said goods from the loading thereof on board the ship *Southampton* at as above." The goods, for so much as concerned that agreement, were valued at "5000*l.* on cotton." The declaration, after stating the policy, averred that the United

(1) Law Rep. 10 Ex. 142.

States Lloyd's and Individual Underwriters at New York were interested in the goods, and that the insurance was made for the use and benefit and on account of the persons so interested. The defendant pleaded amongst other pleas, (4.) denial of the interest alleged; (8.) concealment of the fact that the nature of the interest of the plaintiff and the U. S. Lloyd's and Individual Underwriters of New York was that of insurers desiring re-insurance.

At the trial before Pollock, B., at the Liverpool summer assizes, 1874, it was proved that the plaintiff, an insurance agent, effected the insurance on behalf of the U. S. Lloyd's and Individual Underwriters of New York, who had effected an insurance on the goods, being cotton to be shipped by Tatman & Co., of New Orleans, to the amount of 80,000*l.*, and that the insurance sued on was in fact a re-insurance by the American underwriters of a portion of the risk, they retaining their full lines, 20,000*l.* The defendant, an underwriter, subscribed the policy sued on for 200*l.*

In the slip which was made on the 13th of January, 1873, the insurance was expressed to be "5000*l.*, on cotton."

The defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of re-insurance policies the invariable practice has been to disclose the fact of the insurance being a re-insurance. The fact of the policy being a re-insurance was not disclosed by the plaintiff to the defendant until after he had signed the policy, though it was disclosed to other persons who had effected policies in respect of the same risk, and the plaintiff before he sent on the slip was aware that it was a re-insurance.

The plaintiff and defendant gave evidence on the issue whether the concealment alleged in the 8th plea was a concealment of a fact material to the risk or material to be communicated to the defendant. (1)

It was admitted at the trial that the plaintiff and the United

(1) In the report of the case below, Law Rep. 10 Ex. at p. 143, it is stated that "the defendant gave evidence that he would not have underwritten the policy if he had known that it was a re-insurance, and that it was the practice of many underwriters to refuse re-insurances." A paragraph to this effect was inserted originally in the case on appeal, but was struck out at chambers as immaterial to the present question.

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States Lloyd's and Individual Underwriters of New York were interested in the goods, but as underwriters only.

The cotton of the value so insured by the American underwriters was shipped at New Orleans, the ship sailed on the 28th of February, 1873, and was with the cotton destroyed by fire on the 19th of March.

Pollock, B., ruled that although the plaintiff and the American underwriters were only interested as re-insurers, their interest was sufficiently described in the policy, and that the plaintiff was entitled to recover thereon unless the failure to communicate the nature of their interest was a concealment of a fact material to the risk or material to be communicated to the defendant, and he submitted to the jury the issues of fact raised by the 8th plea. The jury found for the plaintiff on all the issues, and a verdict was entered for him, leave being reserved to the defendant to move to enter the verdict for him.

A rule nisi having been obtained to enter the verdict for the defendant on the ground that the plaintiff being only interested as a re-insurer was not entitled to recover on the policy sued on, the Court of Exchequer (Bramwell, Pollock, and Amphlett, BB.), on the 10th of February, 1875, discharged the rule. (1)

The question for the Court of Appeal is whether the interest of the plaintiff and of the United States Lloyd's and the Individual Underwriters of New York was sufficiently described in the policy sued on, the risk being a re-insurance; whether such risk was covered by the policy; and whether the decision of the Court of Exchequer on that point was wrong. If the Court should be of opinion that that decision was wrong, the verdict is to be entered for the defendant. If contrà, judgment to be signed on the verdict for the plaintiff for 206*l.* 5*s.*

Nov. 16. *Herschell, Q.C.*, and *Baylis, Q.C.*, for the defendant, appellant. The custom proved at the trial was not merely to disclose the fact of the insurance being a re-insurance, but to state it expressly in the slip and policy. This does not appear distinctly from the case, but the evidence was so treated by Pollock, B., in his summing up, and it will not be disputed by the plaintiff's

(1) Law Rep. 10 Ex. 142.

counsel. This is the point intended to be raised, and if the Court considers that it is not distinctly raised the defendant desires to have the case re-stated. There is a substantial reason why underwriters should decline re-insurances, because instead of having only one party to settle with as in ordinary insurances, a third party is introduced who must be consulted.

[For the rest of the arguments and the authorities cited on both sides it is sufficient to refer to the report of the argument in the Court of Exchequer. (1)]

Benjamin, Q.C., and *A. T. Lawrence*, for the plaintiff.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Lord Cairns, L.C., Blackburn and Brett, JJ.), was read by

BLACKBURN, J. This is an appeal against the judgment of the Court of Exchequer, discharging a rule obtained to enter a verdict for the defendant.

The action is on a policy of marine insurance, which is set out in full in the declaration. It is in the ordinary form of a Lombard Street policy, and the blank in the printed form where it is usual to insert the description of the subject-matter of the insurance is thus filled up:—"5000*l.* on cotton." The plaintiff made the policy as agent for and to protect the interest of American underwriters who had insured cotton for Tatman and Co., of New Orleans, to the amount of 80,000*l.*, and it was, in fact, a re-insurance to the amount of 5000*l.*

At the trial a question was raised as to whether there was an undue concealment. On that issue the verdict passed for the plaintiff without any point being reserved, and consequently the Court of Appeal has nothing to do with that issue.

The only question before this Court is that stated in the rule which has been discharged, viz. whether the verdict should be entered for the defendant "on the ground that the plaintiff" (or rather the parties for whom the plaintiff made the insurance, and on whose behalf he sues), "being only interested as a re-insurer, was not entitled to recover on the policy sued on."

(1) Law Rep. 10 Ex. 143–146.

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It is stated in the case that "the defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of re-insurance policies the invariable practice has been to disclose the fact of the insurance being a re-insurance." Mr. Herschell argued on this as if it was a statement that it was the usage and custom of trade always to describe the interest in the policy as being a re-insurance; but we think the statement in the case does not bear that meaning. Re-insurance was in this country prohibited by statute 19 Geo. 2, c. 37, s. 4, unless the assurer should be insolvent, become a bankrupt, or die; "in either of which cases such assurer, his executors, administrators, or assigns might make re-assurance to the amount of the sum before by him assured, provided it was expressed in the policy to be a re-assurance;" and this prohibition continued in force till as late as 1864 (1); so that there has not been sufficient time for a custom to spring up in this country, and there is no such custom in America, where re-insurance was always lawful: see Phillips on Insurance, chap. 5, s. 498, p. 270 (3rd ed.). Moreover, the evidence seems to have been directed to the issue found by the jury for the plaintiff, and has reference, not to the description in the policy, but to the practice of making a disclosure to the assurer.

The question, therefore, seems to us to be confined to this, whether, applying the ordinary principles of interpretation of written documents and the established rules of insurance law to this kind of insurance, the description in this policy is sufficient to cover it. The Court below decided that it was; and we are of opinion that their decision was right, and must be affirmed.

A description of the subject-matter of the insurance is required both from the nature of the contract and from the universal practice of insurers. It is generally described very concisely as being so much "on ship," "on goods," "on freight," "on profits on goods," "on advances on coolies," "on emigrant money," and many other examples might be given. And if no property which answers the description in the policy be at risk, the policy will not attach,

(1) In 1864, by 27 & 28 Vict. c. 56, s. 1, re-assurances on sea risks were made lawful. Sect. 4 of 19 Geo. 2, c. 37 was repealed by 30 & 31 Vict. c. 23, sch. D, and also by 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867).

though the assured may have other property at risk of equal or greater value. The reason being, that the assurers have not entered into a contract to indemnify the assured for any loss on that other property.

Thus, a policy on "piece goods" will not make the insurer liable for a loss on "hats": *Hunter* v. *Prinsep*, Marshall on Insurance, 4th ed. p. 255.

In 1 Phillips on Insurance, chap. 5, s. 415, 3rd ed. p. 231, it is said: "It is necessary that the thing insured, and in some cases also the kind of interest intended to be protected, should be sufficiently set forth in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied." And this seems a fair statement of what is required, and is in strict accordance with what is said by Lord Tenterden in *Crowley* v. *Cohen* (1), that, "although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large."

In some cases the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated. In *McSwiney* v. *Royal Exchange Assurance* (2) the policy was "on profit on rice." The Court of Queen's Bench held the plaintiff entitled to recover, but that judgment was reversed. The Court of Exchequer Chamber, in delivering judgment, say (3): "The first question discussed was whether the plaintiff had an insurable interest in profits on the rice. Under the circumstances stated in the special verdict, we feel no doubt that he had. He had entered into a binding contract with Drouhet & Co., by virtue of which he would have had a right to 6000 bags of rice delivered to him in England on the safe termination of the voyage of the *Edward Bilton* to England, with the whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit of 1*s.* 6*d.* per cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice

(1) 3 B. & Ad. at p. 485.
(2) 14 Q. B. 634; 19 L. J. (Q.B.) 222.
(3) 14 Q. B. at p. 659; 19 L. J. (Q.B.) 226.

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was appropriated by the vendors and ready to be shipped at Madras, and also to insure him against losses of the expected profits, not merely by the loss of all the rice by perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated. If such an assurance had been made on this peculiar interest against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves."

In all cases where the peculiar nature of the interest alters the risk, it may be properly said that such interest is the subject-matter of the insurance; and at all events there is great force in the argument that the nature of that interest should be stated. But in the case now before us, the nature of the interest of the parties assured in the cotton does not in the slightest degree vary the nature of the risk. Had the policy in this case been made by the plaintiff in the very same terms, but on behalf of and to cover the interest of Tatman & Co., the owners of the cotton, the underwriters would have had to pay to the plaintiff the sum which would indemnify Tatman & Co. for any damage to the cotton from the perils insured against, and the plaintiff would have received that sum for the benefit of Tatman & Co. As the facts are, the persons on whose behalf the insurance is made have bound themselves to pay this sum to Tatman & Co., and the defendant is required to pay the same amount, and under precisely the same circumstances, to the plaintiff, but for the benefit, not of Tatman & Co., but of the parties on behalf of whom the plaintiff made the assurance. The subject-matter of insurance, viz. the cotton, is fully described, and there is no apparent reason which would make it just to require the nature of the interest to be described. Still, if there were a series of decisions determining that in such a case, or in cases analogous to it, a description was required beyond what would seem to us reasonable, we should be unwilling to disturb the established practice. But we do not find any such decisions.

In *Glover* v. *Black* (1) the plaintiff had lent a sum of money on a bottomry bond, which is set out in the case at p. 1395. By the condition, if the ship arrived in the Thames, he was to be paid his loan with maritime interest, or if the ship should be utterly lost on the voyage, he was to be paid a just and proportionate average on all goods belonging to the obligor shipped at any time on the vessel, and not unavoidably lost. The plaintiff meant to insure his interest in the bond, and told the underwriters so; but by a blunder drew up the policy in the ordinary form of a policy on goods and merchandize. The underwriters were unconscientious enough to contest the policy, and Lord Mansfield very reluctantly decided in their favour. But it seems enough to state the nature of the plaintiff's interest to shew that the real risk intended to be, but not described, was a very different one from that on goods, which is all that that case decided.

Lucena v. *Craufurd* (2) has always been treated as deciding that, though profits may be insured, they must be described as such, and we took time in this case, principally with a view to see what were the reasons for this decision, and whether they were applicable to such a case as the present.

We cannot find the reasons stated in the report of *Lucena* v. *Craufurd* (2), but in the first case of *Routh* v. *Thompson* (3), in which similar points arose soon after, Lord Ellenborough states them thus, at p. 433: "Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the King's; the freight is altogether the King's; and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the

(1) 3 Burr. 1394. (2) 2 B. & P. (N.R.) 269.
(3) 11 East, 428.

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King may be induced to give them something out of the produce of such ship and freight?"

This reasoning, whether binding as an authority or not, is clear and intelligible; but it seems to us to have no application to such a case as the present. The assured here had a direct interest in the safe arrival of the cotton: not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against.

We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Norris, Allens, & Carter, for Simpson & North, Liverpool.*

Solicitors for defendant: *Gregory & Co., for Hull, Stone, & Fletcher.*

Dec. 6.

WEST *v.* BAKER.

Bankruptcy—Vesting Estate of Debtor in Trustee—Composition—Annulling Bankruptcy—Right to set-off Unliquidated Damages—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 81, 126.

A person in whom the estate of a bankrupt was, on the annulling of the bankruptcy, vested under s. 81 of the Bankruptcy Act, 1869, having sued for a debt due to the bankrupt, the defendant pleaded a set-off, by way of mutual credit at the time of the bankruptcy, between the defendant and the bankrupt, for unliquidated damages proveable in bankruptcy, and which would have been proveable against the bankrupt had the proceedings in bankruptcy continued against him. On demurrer:—

Held, that the plea was good, as the vesting order vested the property of the bankrupt in the plaintiff, subject to the right to set-off debts which would have been proveable in the bankruptcy.

DECLARATION, that the plaintiff, the person duly appointed by an order of the Court of Bankruptcy, bearing date the 6th of

April, 1871, by virtue of which order, and of the 81st section of the Bankruptcy Act, 1869, the property of one James West, including the causes of action hereinafter mentioned, became and was duly vested in the plaintiff, (James West having been duly adjudicated a bankrupt according to the provisions of the Act, and the bankruptcy having been afterwards, to wit, on the 6th of April, 1871, duly annulled by order of the Court of Bankruptcy, and in pursuance of the provisions of the Act), sued the defendant for money payable by the defendant to the plaintiff, as such person duly appointed as aforesaid, for work and labour done and materials provided by James West, as a builder and otherwise, before he became bankrupt, for the defendant, at his request, and on accounts then stated between the defendant and James West, and on accounts stated between the plaintiff as such person duly appointed as aforesaid and the defendant.

Fourth plea, that before the 6th of April, 1871, and before the property of James West became and was duly vested in the plaintiff as alleged, and before James West had been duly adjudicated a bankrupt, and before and at the commencement of this suit, James West was, and still is, indebted to the defendant for debts due by him to the defendant and for damages proveable in bankruptcy by the defendant against him; and that before and at the commencement of this suit, there was, and still is, a mutual debt and credit between James West and the defendant, in an amount equal to the plaintiff's claim and of the alleged debt due and owing from the defendant to the plaintiff in respect of a debt due from James West to the defendant, and damages proveable in bankruptcy by the defendant against James West, and that the debt and the damages aforesaid would be proveable against the estate of James West, had he still continued to be a bankrupt, and the defendant would be entitled to set-off the same against such estate had the assignee in bankruptcy of James West now sued the defendant, and the defendant is willing to set off and sets off the amount of the debt and damages to an amount equal to the plaintiff's claim in respect of the matter herein pleaded to.

Demurrer and joinder.

Malden, for the plaintiff. The plea is bad, as a set-off for un-

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liquidated damages can only be pleaded in bankruptcy. The substance of the plea is, that if the bankruptcy had gone on, the defendant would have been entitled to set off this claim, but to this the fact that the bankruptcy has been annulled is a complete answer. The bankruptcy has been annulled in accordance with the terms of the composition entered into between the bankrupt and the creditors.

Boddam, for the defendant. The plaintiff's sole right to sue is founded on the order in bankruptcy, which vested the bankrupt's estate in him under the Bankruptcy Act, 1869, s. 81, and he cannot at the same time say that his rights arise from the bankruptcy, and yet are independent of it, as they must be if the contention that this set-off is not available is right. The bankruptcy, as pointed out in the note to s. 81 of the Act, in Williams's Bankruptcy, is not so much annulled as superseded, as the proceedings remain under the control of the Court of Bankruptcy. If, however, the plaintiff claims, not under the vesting order, but under the terms of the composition, that would be a matter for reply. (1)

Malden, in reply. If there are any conditions in the composition deed favourable to the defendant, he should have set them out in the plea.

KELLY, C.B. I think that the defendant is entitled to judgment. When we look to the provisions of the Bankruptcy Act we find it is defective in this respect, that it does not provide for a case like the present. In the 28th section we find the power given which has been exercised in this case, and under which the bankruptcy has been annulled. There has been a meeting of creditors, and a general scheme of settlement has been agreed on and received the approval of the Court, and one of the terms of the settlement is that the bankruptcy should be annulled. The whole estate of the bankrupt was undisposed of; and the Court has power under the 81st section, in the case of an adjudication being annulled, to order that the property of the debtor shall vest in such person as the Court may appoint, or, in default of such appointment, revert to the bankrupt. This latter has not been

(1) The composition deed was produced in Court.

done; but the Court has transferred the whole estate of the bankrupt to the plaintiff, no doubt in consideration of the plaintiff having guaranteed a dividend of 7*s.* 6*d.* in the pound. Does this transfer entitle the plaintiff to recover debts freed from the right of the debtor to set off such claims as the present? I think not; because in bankruptcy the debtor could have set off this very claim; and if the Court has transferred to the plaintiff all the authority itself had, that was to sue the defendant subject to the right to set off not only any specific sum, but any claim to unliquidated damages proveable under bankruptcy. If this were otherwise, much injustice would be done. I apprehend the substance of the clauses of the Act is, that what passed to the plaintiff was a right to receive debts, but subject to the right to set off counter claims whether of specific sums or of unliquidated damages proveable in bankruptcy.

CLEASBY, B. I think, if the whole of the 28th section is considered, it is tolerably clear that the conclusion arrived at is right. The question is, whether the effect of the 28th section was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling the bankruptcy, does not take the matter out of the Bankruptcy Court, so as to prevent the general rules of bankruptcy applying, or alter the position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By s. 28 the provisions of a composition or general scheme made in pursuance of the Act may be enforced by the Court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and proveable under the Bankruptcy Act. That clearly shews that the Bankruptcy Court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that Court as to set off.

POLLOCK, B. The only question is the sense in which the word "annulled" is used. Before this Act there were two modes

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of proceeding open, either to go on under the bankruptcy, or to annul the proceedings altogether. Now, however, there is an intermediate course by which the control of the Court is retained, and the annulling of the bankruptcy only means that there shall be no adjudication of bankruptcy in the ordinary way, but the proceedings shall be moulded on the terms of the composition, under the direction of the Court.

I think, therefore, with my Lord and my Brother Cleasby that the defendant is entitled to judgment.

Judgment for the defendant.

Solicitors for plaintiff: *Risley & Stoker.*
Solicitors for defendant: *Robinson & Preston.*

Nov. 20.

OSBORNE *v.* HOMBURG.

Action in Superior Court—Claim reduced by Payment below 50*l.*—*Payment after Action brought—County Court Act,* 1867 (30 & 31 *Vict. c.* 142), *s.* 7.

The power given to a defendant under the County Court Act, 1867, to apply to have a case tried in a county court where the claim indorsed on the writ exceeds 50*l.*, but such claim has been reduced by payment to a sum not exceeding 50*l.*, does not apply where the payment is made after action.

THE plaintiff issued a writ in this Court against the defendant for 66*l.* 18*s.* The defendant, admitting that he was indebted to the plaintiff to the amount of 43*l.*, applied first of all at chambers to have the action stayed on payment of that sum, but as the sufficiency of the amount was disputed, no order was made. The defendant then applied for and obtained an order that on payment of 43*l.* at once to the plaintiff the action should be remitted to a county court, under s. 7 of the County Court Act, 1867 (30 & 31 Vict. c. 142), which enacts that, "Where in any action of contract brought or commenced in any of Her Majesty's Superior Courts of Common Law the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, admitted set-off, or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action within eight days from the day upon which the

writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at Chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court, or one of the county courts, in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly."

A rule having been obtained to rescind this order,

Murphy, Q.C., shewed cause. The order was right. The statute was meant to enlarge the power given by 19 & 20 Vict. c. 108, s. 24, so that where the sum really in dispute is less than 50*l.* the matter may be taken to a county court. The words of the former statute were, "Where in any action the debt or demand claimed consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed by the defendant from the plaintiff." The present statute goes further and gives the defendant an opportunity of acknowledging part of the plaintiff's claim, provided he does so promptly and before any expense is incurred about the pleadings.

Kingsford, in support of the rule. *Walesby* v. *Goulston* (1) shews that under 19 & 20 Vict. c. 108, s. 24, "admitted set-off" must mean admitted before action, so here the claim indorsed on the writ is the claim at the time of action, and since that is over 50*l.* the plaintiff is entitled to sue in the Superior Court. [He referred also to *Avards* v. *Rhodes.* (2)]

PER CURIAM (Cleasby, Pollock, and Amphlett, BB.). The payment, which is to have the effect of reducing the original claim below 50*l.*, must have been made before action. The order is therefore wrong, and must be rescinded.

Rule absolute.

Solicitor for plaintiff: *W. Eley.*
Solicitor for defendant: *E. D. Lewis.*

(1) Law Rep. 1 C. P. 567. (2) 8 Ex. 312; 22 L. J. (Ex.) 106.

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POLLOCK AND ANOTHER *v.* CAMPBELL BROTHERS.

Judicature Act, 1875, (38 & 39 *Vict. c.* 77) *Sch. Order II., Rule* 6; *Order IX., Rules* 2, 6—*Practice—Procedure under Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67)—*Signing Judgment—Personal Service—Partners sued as Firm.*

The effect of the Judicature Act, 1875, Sch. Order II., Rule 6, is that in actions under the Bills of Exchange Act 1855, the procedure provided by s. 1 of the Bills of Exchange Act must be strictly observed, and the plaintiff cannot sign final judgment in default of appearance without filing an affidavit of "personal service." He cannot for that purpose avail himself of Order IX., Rule 6, which provides that where partners are sued in the name of the firm service upon one partner shall be deemed good service upon the firm; nor can he obtain an order for substituted service under Order IX., Rule 2.

THE action was on a bill of exchange, and the writ was indorsed in the special form provided by the Bills of Exchange Act, 1855. The affidavit of the clerk to the plaintiff's solicitors stated that he served it on the premises of the defendants at 39, Lombard Street, City, on a person who had the control and management of the partnership business there, and who informed the deponent that he was a partner, but refused to say (nor did the deponent know) whether he was the sole partner, or what his name was. The defendants not having appeared, the plaintiffs, on filing an affidavit of service as above, applied at the office to sign final judgment under s. 1 of the Bills of Exchange Act. The officer refused to allow it, on the ground that the affidavit did not state the name of the person who had been served; and upon a summons at Chambers for leave to sign judgment, the Master refused to make any order. The plaintiffs then took out a summons for an order for substituted service under Order IX., Rule 2, but this was refused by a Master on the ground that that rule did not apply to proceedings under the Bills of Exchange Act. The plaintiffs having appealed from both decisions, Denman, J., referred the matter to the Court.

Henn Collins, for the plaintiffs. The defendants are sued in the name of the firm as allowed by Order XVI., Rule 10. The writ being indorsed under the Bills of Exchange Act, 1855 (18

& 19 Vict. c. 67), and the defendants not having appeared, the plaintiffs claim to sign final judgment under s. 1 of the Bills of Exchange Act, availing themselves of Order IX., Rule 6, which enacts that where partners are sued in the name of their firm, service upon any one partner "or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there," shall be deemed good service upon the firm. This service the plaintiffs have effected, and this is "personal service" as required by s. 1 of the Bills of Exchange Act. Nothing in that Act, or in the Orders under the Judicature Act, requires that the name of the person served should be known. The master appears to have considered that service on each defendant was still required by virtue of Order II., Rule 6. But that rule means that the procedure under the Bills of Exchange Act shall continue in use, where not inconsistent with any of the other rules. Order II., Rule 6, and Order IX., Rule 6, must be read together, like any other rules. There is no reason in the nature of things why in actions under the Bills of Exchange Act the plaintiff should be deprived of the advantage given to plaintiffs in other actions; and which he would have had if he had specially indorsed the writ under Order III., Rule 6, and the defendant had either not appeared, or had appeared and had not obtained leave to defend under Order XIV., Rule 1. If, however, the Court thinks that personal service on each defendant is necessary, the plaintiffs, being "unable to effect prompt personal service," desire "an order for substituted or other service, or for the substitution of notice for service," under Order IX., Rule 2.

[CLEASBY, B. If Order IX., Rule 6, cannot be read together with Order II., Rule 6, neither can Order IX., Rule 2.]

KELLY, C.B. I was at first under the impression that we ought to accede to this application, and I was disposed to do so because Order IX., Rule 6, is one of the most salutary of the new orders, providing, as it does, that where partners are sued in the name of their firm service of the writ upon one partner shall be good service upon the firm. If it were necessary to decide the question I should be much disposed to think that the provisions of that rule

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have been complied with when, as in the present case, a clerk goes to the place where the partners carry on business, asks to see one of the partners, a person comes forward who says he is a partner, and the clerk serves him with the writ. But the language of Order II., Rule 6, is this: "With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act (18 & 19 Vict. c. 67) shall continue to be used." It is admitted that this is an action under the Bills of Exchange Act. Then the only question is, Is the application for leave to sign final judgment against the firm of partners a part of the procedure under the Bills of Exchange Act? By s. 1 of that Act it is provided that where the writ is indorsed in a special form the plaintiff on filing "an affidavit of personal service of such writ within the jurisdiction of the Court," and complying with certain requirements, may, if the defendant has not obtained leave to appear, and has not appeared, at once sign final judgment. Now is not signing final judgment as much a part of "the procedure under the Bills of Exchange Act" as issuing and indorsing the writ? Clearly it is. I think, therefore, that that procedure must be adopted, and as it has not been adopted in the present case, this application must be refused.

CLEASBY, B. I am of the same opinion. We must give effect to Order II., Rule 6, as well as to Order IX., Rule 6. If we could not give any effect to the latter rule without applying it to the former, we should be bound so to apply it, because we are bound to give some effect to it; but there is no difficulty in giving effect to both rules. The effect of Order II., Rule 6, is to make the procedure under the Bills of Exchange Act continue; and there is a reason: under that procedure a plaintiff is enabled to sign final judgment and seize the defendant's property unless the defendant obtains leave to appear. The practice, therefore, under that procedure is to be very strictly observed. Order IX., Rule 6, is directed generally to the case of partners sued in the name of their firm. There is no difficulty in applying that rule, and we can give it substantial effect without applying it to cases falling under Order II., Rule 6.

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The plaintiffs might have proceeded under the rules (1) which enable a plaintiff seeking merely to recover a liquidated demand in money to indorse the writ specially and to sign final judgment if the defendant does not appear; and if an application for leave to sign judgment under those provisions were made to me, I should require a strict affidavit of service.

HUDDLESTON, B., concurred.

Solicitors: *Bower & Cotton.*

DAUBNEY AND WIFE *v.* SHUTTLEWORTH AND OTHERS. *Jan.* 15.

Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *Sch. Order LV.—Order LIII., Rule* 4—*Order LXI., Rule* 1—*Costs—Notice of Motion invalid—Failure to appear in Court after giving Notice of Motion.*

On the 20th of December, 1875, the plaintiffs served on the defendants a notice that the Court would be moved on the 22nd, or as soon after as counsel could be heard, to reinstate for argument a demurrer in which judgment had been given for the defendants in the absence of the plaintiffs. On the 11th and 12th of January, 1876, the defendants appeared in Court by their counsel to oppose the motion, but no one appeared for the plaintiffs:—

Held, that the notice was bad on two grounds: 1, because, under the Judicature Act, 1875, Sch. Order LXI., Rule 1, the Michaelmas sittings terminate on the 21st of December; and, 2, because there were not two clear days between the 20th and 22nd, as required by Order LIII., Rule 4; that the defendants therefore were not bound to appear, and were not entitled to their costs of doing so.

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THE defendants having demurred to the declaration, the demurrer was called on for argument on the 6th of December, 1875, and judgment was given for the defendants, no one appearing for the plaintiffs. On the 20th of December following the plaintiffs served on the defendants a notice that on the 22nd of December, or so soon after as counsel could be heard, application would be made in this Division to reinstate the demurrer for argument.

Jan. 13. *Cave, Q.C.*, for the defendants, moved for their costs of appearing to oppose the motion, and stated that on the 11th and 12th of January of this year he had appeared in Court with instructions to oppose the motion, but that no one had appeared

(1) Order III., Rule 6; Order XIII., Rules 2, 3.

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on either of those days to move for the plaintiffs. He cited *Berry* v. *Exchange Trading Co.* (1), where the Queen's Bench Division held that a party served with a notice of motion is entitled to his costs of appearing to oppose if the party serving does not appear to support it.

[KELLY, C.B. The notice there was good. Here it was altogether bad, and you ought not to have regarded it.]

The defendants ought not to suffer for the irregularity of the plaintiffs, which they waived in order that the motion might be heard on its merits. Under the new rules no notice can be a nullity in respect of time; the Court might have enlarged the time under Order LVII., Rule 6, and amended the proceedings or dealt with them as they thought fit under Order LIX. It would, therefore, have been unsafe to disregard the notice.

Cur. adv. vult.

Jan. 15. KELLY, C.B. As this is the first occasion on which the point involved in the present case has been raised, and as the decision might be of great importance, we have taken time for consideration.

Generally—indeed in all cases, unless there be some peculiar circumstances—where a notice to appear before the Court on a particular day is served, and the party served appears and the party serving does not appear, we should be disposed to give the party appearing his costs; but in the present case the notice was one which did not call on the defendants to appear. The notice was to appear on the 22nd of December. By the express terms of the rules (2), made in pursuance of the Judicature Act, the Michaelmas sittings shall terminate on the 21st of December, and after that day there could be no sitting of the Court for any purpose. Moreover by the rules (3) there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. This notice was served on the 20th of December, and would therefore not have been valid even if the Court had sat on the 22nd. For both reasons, therefore, the notice was bad.

(1) 1 Q. B. D. 77. (2) Order LXI., Rule 1.
(3) Order LIII., Rule 4.

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DAUBNEY v. SHUTTLEWORTH.

Mr. Cave argued that under the rules (1) the Court has power to enlarge or abridge the time appointed for doing any act, and to amend any proceeding; but the Court has no more power to amend the notice of motion by altering the day named than it has to pass an Act of Parliament. The notice was obviously so bad that it could not be cured, and the defendants need not have appeared. The application for costs must therefore be refused.

CLEASBY, B. I will only add that the notice was that the plaintiffs would apply to reinstate the case, upon which it is not usual to hear an argument.

HUDDLESTON, B., concurred.

Solicitors for defendants: *Swann & Co.*

KIRK, EXECUTOR, &c., *v.* GREGORY AND WIFE.

Jan. 11.

Trespass—Asportation—Goods of Deceased—Executor.

A near relative of a deceased person being in the house at the death, removed some jewelry of the deceased from one room to another. The executor having brought trespass for this asportation, the jury found that the defendant removed the goods bonâ fide for their preservation:—

Held, that this was no answer to the action.

Semble, per Bramwell and Amphlett, BB., that if the defendant had proved not merely that the interference was made bonâ fide for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner, this would have constituted a good defence.

THE first count of the declaration alleged that the female defendant converted to her own use certain jewelry and diamond rings, the property of the plaintiff as executor.

The second count alleged a trespass by the female defendant, of the same goods.

Pleas: 1. Not guilty; 2. That the goods were not the goods of the plaintiff as executor. Issue thereon.

At the trial before Bramwell, B., in Middlesex, on the 11th of May, 1875, the following facts were proved:—The plaintiff's testator died in July, 1874, in his own house while in a state of delirium tremens. His attendants and others were feasting and

(1) Order LVII., Rule 6, and Order LIX.

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drinking in the house. The female defendant, who was the wife of the testator's brother, immediately after the death, took out of an unlocked drawer in the room where the testator died some diamond rings and jewelry belonging to the testator, and (as she said) placed them with a watch of the testator's in a box, and put the box into a cupboard in another room for safety. The box and cupboard were unlocked. The plaintiff on being informed, found the watch, but the rings and jewelry were missing and had never been found.

The learned judge ruled that there was no evidence of a conversion; but—the plaintiff's counsel insisting that he was entitled to a verdict on the count in trespass—left to the jury the question, whether the female defendant had put the things away bonâ fide for the purpose of preserving them? The jury answered the question in the affirmative, and the learned judge thereupon directed the verdict to be entered for the defendants, giving leave to the plaintiff to move to enter the verdict for him for 1*s.* damages on the count in trespass; the defendants to have liberty to add any plea of justification which the facts would support; neither party to appeal from the decision of the Court.

A rule nisi having been obtained for a new trial on the ground of misdirection, in that the learned judge ought to have asked the jury not only whether Mrs. Gregory put the rings into the cupboard for their preservation, but also whether it was reasonable for her to do so, and whether it was negligent; or to enter a verdict for the plaintiff for 1*s.*, pursuant to leave reserved, if the Court should be of opinion that on the facts proved the plaintiff was entitled to a verdict on the trespass count for nominal damages only.

Anstie, for the defendants, shewed cause. To constitute a trespass, there must be a wrongful taking; here there was none such. To find and take possession of lost goods is no trespass, as is shewn by the action of trover, which was invented to suit the case of the defendant having come lawfully into the possession of the plaintiff's goods, and was based on the fiction of his having found them. The goods of a person lately deceased are in a similar position. Ordinarily, as in the present case, it is not known at that time who is the executor, or whether there is any executor at all. If there is no executor, the property is in the Judge Ordi-

nary until letters of administration are granted; even if there is an executor and he is known, an interval of time must elapse before he can take possession. For practical purposes, therefore, except in the rare case of an executor having been appointed, being known and being on the spot, the goods of a person lately deceased are in the same position as lost goods; there is either no owner known, or none capable of exercising an owner's rights. But if the plaintiff's view is right the absurd consequence follows that, under these circumstances, every act done upon the goods of the deceased or in his premises is a trespass. If, however, such acts are not necessarily trespasses, they become such only by not being done bonâ fide; want of care or reasonableness cannot make an act a trespass which is not otherwise such, but a dishonest intention may. Here the act was done bonâ fide for the preservation of the goods. This, under such circumstances, is the subject of a natural though not a legal obligation, and the quality of the act in this view is determined by its purpose and not by its prudence. If the act were done negligently, it would afford ground for a distinct form of action, as in the case of an involuntary bailee, and the gist of the action would not be trespass but negligence. But that is not the form of the present action, nor was that issue ever presented to the jury.

Cave, Q.C. (*Horace Smith* with him), for the plaintiff. Removing the goods from the drawer was an asportation, and it would be no answer to say that the things would otherwise have been lost, even if the defendants had thereby saved them instead of losing them as they did. In Bac. Abr. Trespass, E. 7th ed. by Gwillim & Dodd, p. 671, it is said: "If J. S. take the goods of J. N. to prevent them from being stolen or spoiled, an action of trespass lies; because the loss to J. N. would not, if either of these things had happened, have been irremediable. But if the goods of J. N. are in danger of being destroyed by fire, and J. S., in order to prevent this, take them, this action does not lie; because the loss if this had happened would have been irremediable." For this Bro. Abr. Tresp. pl. 213, is cited. See also *Isaac* v. *Clark* (1) and *Reg.* v. *Thurborn*. (2)

(1) 2 Bulst. 306, 312; 1 Roll. Rep, 126, 130.
(2) 1 Den. Cr. C. 387.

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No one has the right to remove a testator's goods for safety pending probate or the grant of administration. That the goods may be lost or destroyed is merely an excuse; and a good motive is no justification of the trespass. In *Fouldes* v. *Willoughby* (1), approving *Bushel* v. *Miller* (2), the turning the defendant's horses by the plaintiff out of his ferry-boat was held not to be a conversion, as there was no intent to appropriate nor any change in the quality of the chattel; but it was assumed in the judgments that the plaintiff might have maintained trespass; and Alderson, B., says: "Scratching the panel of a carriage would be a trespass." The plaintiff is entitled to the full value of the goods, and there must be a new trial on the ground of misdirection.

[*Anstie*, being invited by the Court to elect between a new trial and a verdict for the plaintiff for 1*s*. damages without a certificate for costs, elected the verdict.]

BRAMWELL, B. This rule must be absolute to enter a verdict for the plaintiff for one shilling. If there were a reasonable hope of substantial damages being recovered there ought to be a new trial, but all that Mr. Cave has a right to is, I think, a verdict for a shilling. There has clearly been an asportation which the defendants have to justify. Mr. Anstie, on their behalf, had leave to add any plea he thought fit, provided it was a good plea. Suppose there were a plea to the effect that the owner of the goods was recently dead, the executor was unknown, no one was in charge of the house, that the defendants were near relations of the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. I am inclined to think this would be a good plea. The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewelry in the house of a man just dead. But the whole of the supposed plea was not proved. The jury found that the defendant acted bonâ fide, that is to say, that the articles were removed for their preservation; but it was not proved that the interference was reasonably necessary, that is to say, that the things were in a position to require the interference, and that the interference was reasonably carried out. Mr. Anstie ingeniously

(1) 8 M. & W. 540, 549. (2) 1 Str. 128.

argued that the responsibility of a person under circumstances of this kind is really a question of negligence and not of trespass. I do not think it is. But even if it were, it was not shewn that the goods were in jeopardy. The supposed plea has not been proved. As the point now raised by the plaintiff never went to the jury, the defendants would be entitled to a new trial; but as they do not ask for it, the verdict must be entered for the plaintiff for 1s. damages.

CLEASBY, B. I am of the same opinion. I think it most important to guard the goods of a deceased person from interference, except in case of necessity. Beyond that, I think, no intermeddling ought to be allowed. Voluntary and capricious interference should be altogether forbidden.

AMPHLETT, B. I am of the same opinion. I should be sorry to be understood to mean that it is not competent to a member of a family or a servant of the house to interfere for the protection of the property of a deceased person. I think they would be fully justified in putting away articles and locking them up. In 1 Williams on Executors, 7th ed. p. 261, I find it stated in reference to an executor de son tort that "there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself or out of the deceased's effects, making an inventory of his property, feeding his cattle, repairing his houses, or providing necessaries for his children; for these are offices merely of kindness and charity." I agree, however, with my learned Brothers, that a reasonable necessity for such interference must be shewn. That question not having been left to the jury, we have no option but to grant a new trial or direct a verdict to be entered for the plaintiff. I agree that the verdict should be entered for the plaintiff for one shilling.

Rule absolute to enter the verdict for 1s.

Solicitors for plaintiff: *Parker, Lee, & Haddock.*

Solicitors for defendants: *Rogerson & Ford, for Carter, Nottingham.*

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Nov. 5.

JONES *v.* ADAMSON.

Ship—Charterparty—Breach of Contract—Damages—Proximate Cause.

The defendant chartered the plaintiff's ship upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but owing to the defendant's default was not ready when her turn came, and was consequently detained eleven days. When her turn came round again she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently detained three days. The plaintiff having sued on the charterparty claiming damages for the detention:—

Held, that the detention for the three days was the legal and natural consequence of the defendant's default in not having the ship ready for the first turn, and that the plaintiff was entitled to damages in respect of the three days as well as the eleven days.

THIS was an action for breach of a charterparty, in which the plaintiff claimed damages for the detention of his ship by the charterer.

At the trial before Huddleston, B., at the Liverpool summer assizes, 1875, it appeared that the clause in the charterparty sued on was that the ship should go to a foreign port for a cargo, "and there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but when her turn came was not ready, and was in consequence detained eleven days until her second turn came, when the ship was ready, but the wind having come on to blow, and the harbour being crowded, the harbour-master would not allow the ship to go up to load, and she was consequently detained three days. The defendant endeavoured to prove that the loss of the first turn was not in fact caused by the defendant's default; and contended, that even if it was, still he was not liable for the detention during the last three days, which was caused by the state of the weather. The jury found a verdict for the plaintiff for damages in respect of fourteen days' detention, leave being reserved to the defendant to move to reduce the verdict by 93*l.* 15*s.*, the amount of damages in respect of the last three days.

Benjamin, Q.C. (*Foard* with him), for the defendant, moved

accordingly. The damages for the detention during the last three days are too remote: they are not the legal and natural consequence of the defendant's default in losing the first turn. The proximate cause was the extraordinary state of the weather, and the refusal of the harbour-master, over whom the captain had no authority, and for whose acts the defendant cannot be held responsible.

CLEASBY, B. (1) There must be no rule. The detention for the three days ought to be considered as part of the damages. There were not two separate delays, but one delay. It was not a question of one turn or two turns, but the contract was that the ship should load in her regular turn, and the breach of it caused a loss of fourteen days. It has been argued that the defendant is not responsible for the three days, because the detention was caused by events over which he had no control. But I do not agree to that. The proximate cause of the detention for the three days was the default of the defendant in not performing his contract to load in regular turn, and not any great catastrophe caused by vis major.

AMPHLETT, B., concurred.

Rule refused.

Solicitors for plaintiff: *Chester, Urquhart & Co., for Gill & Archer, Liverpool.*

Solicitors for defendant: *R. Miller & Wiggins.*

(1) Kelly, C.B., had left the Court.

1875
Dec. 2.

[IN THE EXCHEQUER CHAMBER.]

PHILPS, TRUSTEE, *v.* HORNSTEDT.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) s. 6, *subs.* 2—*Fraudulent Conveyance.*

The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for 245*l.* for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy if the bill were not met. This acceptance not being met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was bonâ fide, but the brandy formed in fact the whole property of the firm:—

Held, that although the transaction under which the defendant obtained power to sell the brandy might be a "conveyance, gift, delivery, or transfer" within the meaning of the Bankruptcy Act, 1869, s. 6, subs. 2, it was not "fraudulent" within the meaning of the Act, because the defendant's consent to give the bankrupt seven days' time to pay the debts due, taking his acceptance at seven days, was an equivalent for the power of sale given to the defendant.

APPEAL from the decision of the Court of Exchequer discharging a rule to enter a verdict for the plaintiff. (1)

Feb. 11, 1874. The case was argued by *Prentice, Q.C.* (*R. V. Williams* with him), for the appealing plaintiff; and by *Garth, Q.C.* (*Grantham* with him), for the defendant. The following authorities were referred to: *Ex parte Hawker* (2); *Woodhouse* v. *Murray* (3); *In re Wood* (4): *Martin* v. *Reid* (5); *Lomax* v. *Buxton* (6); *Mercer* v. *Peterson* (7); *Edan* v. *Dudfield* (8); Eden on Bankruptcy, 2nd ed. p. 25.

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(1) Law Rep. 8 Ex. 26, where the facts are fully stated.
(2) Law Rep. 7 Ch. 214.
(3) Law Rep. 2 Q. B. 634; Law Rep. 4 Q. B. 27.
(4) Law Rep. 7 Ch. 302.
(5) 11 C. B. (N.S.) 730; 31 L. J. (C.P.) 126.
(6) Law Rep. 6 C. P. 107.
(7) Law Rep. 2 Ex. 304; Law Rep. 3 Ex. 104.
(8) 1 Q. B. 302.

Dec. 2, 1875. The judgment of the Court (Lord Coleridge, C.J., Grove, Quain, Archibald, JJ.) (1) was delivered by

LORD COLERIDGE, C.J. The transaction sought to be impeached by the plaintiff as trustee in bankruptcy of McFarlane & Co., is described in paragraph 11 of the case (2), and it is contended that, coupled with the finding that the brandies in question were substantially the only property the bankrupt then had, the transaction in question amounted to an act of bankruptcy as being a fraudulent "conveyance, gift, delivery, or transfer" of the whole of the bankrupt's property in consideration of a past debt only. There was no fraud in fact, the jury having found that the transaction was a bonâ fide arrangement honestly entered into and honestly carried into effect, and that the defendant had no knowledge that the brandies constituted the whole of the bankrupt's property. It being conceded that the defendant's ignorance that the brandies constituted the whole of the bankrupt's property cannot affect the rule of law, it was argued for the plaintiff that the giving the power to sell the brandy in case the bill of exchange was not paid was in effect and substance, though not in name, "a conveyance, gift, delivery, or transfer" of the whole of the bankrupt's property. On the other hand, it was contended that merely giving a power to sell at the end of seven days brandy already in the possession of the defendant, and on which he had a lien for a part of the debt, did not amount to "a conveyance, gift, delivery, or transfer" of the brandy, inasmuch as neither the property nor the possession were altered. If the only consideration for giving this power of sale had been the past debt, we are disposed to think that the transaction in substance would amount to a transfer of the property, at least at the end of the seven days. The words used are, if the bill is not paid, "you are at liberty to do what you like with the brandy." To hold otherwise would be to suggest an easy way of evading the rule of law which we have been considering; we should therefore hesitate to affirm the judgment of the Court below on this first point.

(1) Keating and Honyman, JJ., were members of the Court when the arguments were heard, but before the judgment was delivered the former had retired and the latter had died: see post, p. 66.

(2) Law Rep. 8 Ex. at pp. 27, 28.

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But there is another ground on which we think that the judgment of the Court below is right, and ought to be affirmed. It appears to us that the consideration for giving this power of sale was not the past debt only, but that it was also given on a new and fresh consideration, and that the transaction, therefore, is not within the rule. This is the second ground on which Bramwell, B., bases his judgment in the Court below. "With what reason," he asks, "can it be said that there was here an assignment or charge without a present equivalent?"

The bill for 245*l.* being in defendant's hands unpaid, he agreed to give the bankrupt seven days' time for the payment of the debt, and to take a new bill at that date for both debts; and in consideration of the defendant so doing, the bankrupt gave him power to sell the brandy and pay himself out of the proceeds, in case the new bill was not met at maturity. The taking up or retiring of the old bill, and giving seven days' time for the payment of the debt, might have been of great value to the debtor and his estate; it might have saved his credit, though it certainly did not save him from bankruptcy in the present instance. It seems now well established that assignments of debtors' property are not fraudulent acts of bankruptcy if the debtor gets what has been called a fair present equivalent or substantial consideration, and the inadequacy of the equivalent or consideration will not make the assignment fraudulent as a matter of law, though it will be strong evidence from which the jury may infer fraud. In *Mercer* v. *Peterson* (1), where a bill of sale had been given of all a trader's property to secure a past debt and for a further advance of 64*l.*, the rule of law was stated to be "that where a trader assigns his whole property, but receives in return a fair equivalent the transaction is not void under the bankrupt law." In *Lomax* v. *Buxton* (2) the same rule was acted on, though the fresh advance in that case was made in order to pay off an old debt due to another creditor on a previous bill of sale.

In that case the fresh advance is likened to a substantial exception out of the debtor's property; "such an exception as might possibly enable him to carry on his trade with advantage."

In *Ex parte Fisher* (3) all the cases on this subject were con-

(1) Law Rep. 3 Ex. 104. (2) Law Rep. 6 C. P. 107.
(3) Law Rep. 7 Ch. 636.

sidered by Mellish, L.J., and the assignment in that case was set aside, as the Lord Justice inferred fraud in fact from the smallness of the fresh advance and from other circumstances connected with the transaction. "We are of opinion," he says, "that there was no reasonable probability, and that Mr. Wells and the bankrupt must have known that there was no reasonable probability, that the advance of 100*l.*, to be repaid in a week or ten days, would enable the bankrupt to go on." In the present case, after the finding of the jury, no question as to fraud in fact can arise; but it will be seen that, in both the cases last cited, one of the tests applied in judging of the validity of the equivalent or fresh consideration is, whether it was such an advantage as might, or as the parties reasonably believed might, enable the trader to go on.

In fact, no doubt in all these cases the equivalent or fresh consideration has been an advance in money either paid to the debtor himself or to others in his relief, and it remains to be considered whether an honest giving of time to a trader, as in the present case, may not be as fair and valuable an equivalent, and as advantageous to him as a fresh advance in money, which, as observed by Cockburn, C.J., in *Mercer* v. *Peterson* (1), "is too often dissipated, and the creditors receive no benefit from it."

There is another case before the Chief Judge in Bankruptcy, *Ex parte Reed* (2), in which the learned judge makes some comments on the meaning of the expression "equivalent" which ought to be cited. In that case it was held that payment of bills by the drawer at the request of the acceptor, who in consideration thereof assigned to the drawer all his property to secure the amount and also to secure certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy.

In delivering judgment the learned Chief Judge observes: "'Equivalent,' no doubt, is an expression which may mislead, but I do not understand that in any of the cases it means a substantial sum of money paid down. If the trader carrying on his business has something done for him which enables him to continue carrying it on, that is an equivalent. It does not go directly to the creditors, but the creditors are greatly interested in the fact of the man carrying on his business, and if the transaction enables

(1) Law Rep. 3 Ex. 104, at p. 106. (2) Law Rep. 14 Eq. 586.

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him to do so, it cannot be said that the creditors had not some equivalent."

Considering that the case before the learned Chief Judge was a money payment by the drawer of bills of exchange at the request of the acceptor, it would not be right to infer from his judgment that when he used the expressions just quoted he had in his contemplation such a case as we are now considering, where there was no money payment, and only a mere giving of time. But we adopt his language as expressing the principle of the decided cases, "that if the trader carrying on his business has something done for him which enables him to continue carrying it on, that is an equivalent."

The present case is an ordinary mercantile transaction. It is plain that there was no attempt or intention to evade the bankrupt laws. The jury have found that it was a bonâ fide arrangement honestly entered into and honestly carried into effect. It is, therefore, impossible to say, under the circumstances, that the forbearance in this case might not have been of the greatest value to the bankrupt; it might have saved his credit, and enabled him to go on and get over his difficulties.

It may be said that if such an equivalent or consideration is admitted, the rule of law may be easily evaded in every case. The answer is, that when it appears that the giving of time was merely colourable and that time was given merely for the purpose of securing the past debt, fraud in fact would be inferred, and the transaction would be void. But here the finding of the jury relieves the present case from all such considerations.

For these reasons we are of opinion that this transaction does not contravene either the letter or spirit of the bankrupt laws, and therefore that the judgment of the Court below ought to be affirmed.

This must be taken to be the judgment of my Brothers Grove, Quain, Archibald, and myself. Since the case was heard, owing to some misadventure as to the preparation and delivery of this judgment, two of those who were present at the argument, viz., Sir Henry Keating and Sir George Honyman, have ceased to be judges. I am happy, however, to be able to say that Sir Henry Keating had, before he retired from the Bench, signified his entire concurrence in our decision; and with regard to Sir George Hony-

man—who, to the deep and lasting regret of all who had the privilege of his friendship, has passed away from amongst us—from what I gathered from him the last time I had an opportunity of communicating with him upon the subject, I have no reason to believe that he at all dissented from our view.

Judgment affirmed.

Solicitors for plaintiff: *Evans, Laing, & Eagles.*
Solicitor for defendant: *Handson.*

EDDLESTON, APPELLANT; BARNES, RESPONDENT. *Dec. 8.*

Nuisance—Sending forth Black Smoke—Orders of Abatement and Prohibition—Conviction under separate Orders for the same Matter—Nuisances Removal Act, 1855 (18 & 19 *Vict. c.* 124)—23 & 24 *Vict. c.* 77, *s.* 13—*Sanitary Act*, 1866 (29 & 30 *Vict. c.* 90).

Black smoke having issued from a chimney in such quantities as to be a nuisance, an order of abatement was made under the Nuisances Removal Act, 1855, and the Sanitary Act, 1866; subsequently, black smoke having again issued from the chimney, an order was made upon the complaint of the respondent, under 23 & 24 Vict. c. 77, s. 13, prohibiting the recurrence of the nuisance. Two informations having been laid, one in respect of each order, but both founded on the same act of emission of black smoke :—

Held, that the act complained of being the same in each case, there could not be two convictions in respect of it.

Two special cases were stated for the opinion of this Court on appeal from two several orders of justices convicting the appellant under the circumstances hereinafter appearing.

The appellant and his partner George Briggs were dyers at Sowerby Bridge, in the West Riding of Yorkshire, and were summoned before justices to answer an information that they on a day therein named did send forth black smoke from a certain chimney belonging to premises occupied by them (not being the chimney of a dwelling-house) in such quantity as to be a nuisance, contrary to the provisions of the Sanitary Act, 1866, and the Nuisances Removal Act, 1855. On the 11th of March, 1871, when the summons was returnable, the persons charged did not appear. An order was thereupon made, which after reciting the information, continued as follows:—"Upon proof . . . . that the nuisance so complained of doth exist on the premises, and that the same is caused by the act or default of the said Robert Eddleston

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EDDLESTON v. BARNES.

and George Briggs, we, in pursuance of the Act, do order the said Robert Eddleston and George Briggs within one calendar month from the service of this order, or a true copy thereof, according to the Act, to cease to send forth black smoke from the chimney aforesaid, so that the same shall no longer be a nuisance or injurious to health. And if the above order of abatement be not complied with, then we authorize and require the said John Barnes from time to time to enter upon the premises and to do all such works, matters, and things as may be necessary for carrying this order into full execution." (1)

In March, 1874, an information was laid under the 13th section of 23 & 24 Vict. c. 77 (2), against the appellant and his partner George Briggs, for sending forth black smoke from a certain chimney belonging to the premises occupied by them (not being the chimney of a private dwelling-house) in such quantity as to be a nuisance, and that such nuisance was likely to recur.

At the hearing, on the 14th of March, it was proved that the nuisance complained of existed, and the justices being of opinion that the same or a like nuisance was likely to recur, made an order as follows:—" We, in pursuance of the statute in such case

(1) By the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 12, the local authority may cause complaint to be made of any nuisance, and " If it be proved to their (the justices') satisfaction that the nuisance exists or did exist at the time when the notice was given, or, if removed or discontinued since the notice was given, that it is likely to recur or be repeated, the justices shall make an order in writing under their hands and seals for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned."

By s. 13 authority is given to the justices to order works necessary to abate the nuisance, and if the justices are of opinion that such or the like nuisance is likely to recur, they may further prohibit the recurrence of it, and direct the works necessary to prevent such recurrence.

By s. 14, " Any person not obeying the order of abatement shall, if he fail to satisfy the justices that he has used all due diligence to carry out such order, be liable for every such offence to a penalty of not more than ten shillings per day during his default; and any person knowingly and wilfully acting contrary to the order of prohibition shall be liable for every such offence to a penalty not exceeding twenty shillings per day during such contrary action."

By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 19, the word " nuisance " under the Nuisances Removal Acts includes " any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance."

(2) The proceedings under this section are similar to those under the Nuisances Removal Act, 1855, but the complaint may be by an inhabitant.

made and provided, order the said Robert Eddleston and George Briggs within fourteen days from the service of this order, or a true copy thereof, according to the statutes, to discontinue the said nuisance, and we, further, in pursuance of the said statutes, do prohibit the recurrence of the said nuisance."

In April, 1875, two informations were laid by the respondent against the appellant, alleging that he on the 9th of February, 1875, unlawfully had not obeyed the order of abatement of the 11th of March, 1871, and the order of prohibition of the 14th of March, 1874, respectively.

On the hearing of the first of these informations it was proved that between ten and eleven o'clock in the forenoon of the 9th of February, 1875, black smoke was emitted from the chimney for a period of eight minutes, in a sufficient quantity to be a nuisance; and the appellant was convicted in a penalty of 10*s.* and costs for disobedience to the order of abatement of the 11th of March, 1871. Immediately afterwards, upon exactly the same evidence, he was convicted in a penalty of 20*s.* and costs for disobedience to the order of prohibition of the 14th of March, 1874.

The question for the opinion of the Court was, whether the appellant could be so convicted twice in respect of the same matter.

Maule, Q.C., for the appellant. The two convictions are founded on the same act, and the evidence in support of the second was exactly the same as that given in the first case. They cannot, therefore, both be supported.

Anstie, for the respondent. The remedies given by the acts are cumulative, and the one act done on the 9th of February constituted two offences. There is a distinction drawn in the statute itself between the two cases, for disobedience to an order of abatement is punishable where the offender has not used due diligence to comply with it, while disobedience to an order of prohibition consists in knowingly and wilfully acting contrary to it. He referred to *Reg.* v. *Waterhouse* (1), and *Wemys* v. *Hopkins*. (2)

Maule, Q.C., was not heard in reply.

KELLY, C.B. I think it is clear that one of these two convic-

(1) Law Rep. 7 Q. B. 545. (2) Law Rep. 10 Q. B. 378.

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tions must be quashed. If we take the two Acts together, their substantial provisions result in this, that causing or permitting black smoke to issue from any chimney (not being the chimney of a private dwelling-house) in such quantities as to be a nuisance is made illegal. That is the offence which has been committed in this case, and power is given to the magistrates to order such a nuisance to be abated; and any person not obeying an order for abatement is liable for every such offence to a penalty of not more than 10*s.* a day during his default. But the statute also confers an authority to make an order prohibiting the recurrence of the nuisance, and disobedience to that order is met by a penalty not exceeding 20*s.* a day for every offence. In the Court of Queen's Bench in *Reg.* v. *Waterhouse* (1) the first order made in this case, which has been called an order of abatement, was treated as infringed on each separate occasion when black smoke was allowed to issue. It seems to me to be clear that, according to the construction put upon that order by the Court, and especially by Blackburn, J., it also amounted to an order prohibiting the recurrence of the nuisance, and that part of the order was given effect to by the judgment of the Court. It is clear to my mind that any nuisance which existed in 1871, and was directed by the order to be abated, must have been abated a long time ago; and if that order is to be treated as having been disobeyed in 1874, it must be by construing it as an order of prohibition. The order of 1874 was clearly an order of prohibition, or, at all events, was not for abating only, but also for prohibition. In 1875 it appears that there were two informations against the appellant, one for violation of the order for abatement, the other for violation of the order for prohibition. I think that the conviction on the latter charge should be affirmed, but that the conviction for violating the order of abatement made four or five years ago should be quashed.

CLEASBY, B. I am also of opinion that one of the convictions must be quashed. Considerable difficulty in this case arises in applying the language of s. 12 of the Act of 1855 to a nuisance made so by the Act of 1866 as interpreted by the Court of Queen's

(1) Law Rep. 7 Q. B. 545.

Bench. Looking only to the Act of 1855 there is no difficulty in applying the two penalties with regard to the nuisances dealt with in that Act. Those nuisances are things in existence, and not acts done producing certain effects and called nuisances. Sect. 12 deals in a very precise way with nuisances ascertained by the local authority, and provides for the case of their being likely to recur or be repeated. In view of this probability of recurrence there is a power given to make two sets of orders, one as to the nuisance as it was, the other as to prohibiting its recurrence. When we come to the Act of 1866, what is made a nuisance is something of the same sort as those dealt with in the prior Act, namely, a chimney emitting black smoke. But it has been held by the Court of Queen's Bench that the nuisance is the act of emitting smoke, and tha being so it follows that there cannot be two convictions, because there is only one condition to which this state of things can apply, that is, the causing black smoke to be emitted. I think, therefore, one conviction must be quashed.

POLLOCK, B. I am of opinion that the appellant ought not to be convicted twice. Logically, what was done by the appellant was done in disobedience to both the orders, but the question is, whether, the evidence of the act done being the same in each case, there can be two offences which may be dealt with concurrently. I think not in this case, for though I am far from saying that that can never happen, here the statutes are in pari materiâ, the orders are in pari materiâ, and the conduct complained of in each information is identical. Our judgment must, therefore, be for the appellant.

Judgment for the appellant. (1)

Solicitor for appellant: *Bower & Cotton, for Francis Jubb, Halifax.*

Solicitors for respondent: *Holroyde & Smith, Halifax.*

(1) The judgments entered were that the conviction for disobedience to the order of the 11th of March, 1871, should be confirmed, and that for disobedience to the order of the 14th of March, 1874, should be quashed.

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QUINCEY *v.* SHARPE AND ANOTHER.

Statute of Limitations—Acknowledgment—Request for an Account.

In an action for work done, the plaintiff, in answer to a plea of the Statute of Limitations, put in evidence the two following letters, written within six years of the commencement of the action by the defendants' testator, the person for whom the work was done, to the plaintiff:—"I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week":—

Held, that they amounted to a promise to pay the balance due on the account, and took the case out of the statute.

THIS was an action for work done during his lifetime for John Sharpe, deceased, the testator of the defendants, who paid money into Court as to a part of the claim, and as to the residue pleaded the Statute of Limitations.

At the trial before Kelly, C.B., at the sittings in Middlesex in Hilary Term, 1875, a verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit on the ground that the Statute of Limitations barred the claim.

The plaintiff relied on the two following letters, written to him by the testator, as an acknowledgment of the debt which prevented the operation of the statute.

"Mr. Quincey. Jan. 13, 1872.

"Sir,—I shall be obliged to you to send in your account, made up to Christmas last.

"I shall have much work to be done this spring, but cannot give further orders until this be done.

"I am, sir, your humble servant,

"J. Sharpe."

"Mr. Quincey. Feb. 19th, 1872.

"Sir,—You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week, to oblige, Sir, yours, &c.,

"Jno. Sharpe."

No account had, in fact, been sent in, in compliance with the request contained in these letters.

A rule was obtained, pursuant to the leave reserved, against which

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Armitstead (*Baylis, Q.C.*, with him), shewed cause. An acknowledgment of the existence of a debt is sufficient; for upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied: per Lord Tenterden in *Tanner* v. *Smart* (1), and the same is laid down by Parke, B., in *Smith* v. *Thorne* (2), where he says: "No doubt a mere acknowledgment of the existence of a debt (as, for instance, an I. O. U.), if unaccompanied by any expressions which control its effect, is sufficient to support an unconditional promise to pay." He referred also to *Philips* v. *Philips* (3), *Williams* v. *Griffith* (4), and *Chasemore* v. *Turner*. (5)

Philbrick, Q.C., and *Channell*, in support of the rule. There is no admission of a balance being due, as in *Chasemore* v. *Turner*. (5) It is perfectly consistent with these letters that the indebtedness may be the other way, and that the testator was only anxious to ascertain what orders he should give the plaintiff to work it out. Almost all the cases have contained some promise to pay the balance when ascertained, as in *Smith* v. *Thorne*. (2) Parke, B., in that case, in using the illustration of an I. O. U., shews that when he said a mere acknowledgment of the existence of the debt was sufficient, he meant more than appears in these letters. They referred to *Prance* v. *Sympson* (6); *Edmonds* v. *Goater* (7); *In re River Steamer Co., Mitchell's Claim* (8); *Rowe* v. *Hopwood*. (9)

KELLY, C.B. This case appears to me to be quite free from doubt. Where there is a clear acknowledgment of a debt a promise to pay must be inferred. That is laid down after much consideration by Lord Tenterden in *Tanner* v. *Smart*. (1) Nothing has occurred in any Court of Westminster Hall to shake the authority of Lord Tenterden in thus declaring the principle which ought to govern such cases. Let us see what is the acknowledgment here. The

(1) 6 B. & C. 603.
(2) 18 Q. B. 134.
(3) 3 Hare, 281.
(4) 3 Ex. 335; 18 L. J. (Ex.) 210.
(5) Law Rep. 10 Q. B. 500.
(6) Kay, 678.
(7) 15 Beav. 416; 21 L. J. (Ch.) 290.
(8) Law Rep. 6 Ch. 822.
(9) Law Rep. 4 Q. B. 1.

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first letter requests that the plaintiff's account should be sent in made up to Christmas. That necessarily implies that work has been done, that it has been done up to Christmas, and that there is a subsisting account, and this, in my opinion, shews that there is an acknowledgment that something is due. The case of *Prance* v. *Sympson* (1) puts an acknowledgment of an account on the same footing as an acknowledgment of a debt or liability. There was no positive expression of a balance being due, but it was held by Wood, V.C., to be quite enough that the debtor said there was an account pending, and that he promised to pay the balance that might be due. I see no difference between an acknowledgment of a debt and one of an account. Then follows the second letter again requesting the plaintiff to send in his account. What do these letters import but that orders have been given and executed which have not been paid for? If they do not mean this I think they can have no meaning put on them, and I am therefore clearly of opinion that they take the case out of the statute.

CLEASBY, B. It seems to me on the authorities as they stand that if a man, in writing, says, Be so good as to send me your account and I will pay the balance, that is sufficient to take the case out of the statute. It is an acknowledgment of that debt which may be proved to be really the debt due. When he says, Send me in your account, I read that not as saying, Send in any sort of account, but, Send in your account in which you make me your debtor. The question then is, whether there being this unqualified acknowledgment by which the writer makes himself out debtor, he does so in such a way that you must infer it was done with the intention of paying the debt which should appear to be due on that account. I can only suppose that he asked to have it sent in that he might pay it. It is suggested that the request may be read in another way, and if there were anything in the letters from which it might be inferred that the writer wished to arrive at the scale of charges, I doubt whether that would be an unqualified acknowledgment of anything in the nature of a debt. I read these letters according to the rule laid down by Wood, V.C., adopted in *In re River Steamer Co., Mitchell's Claim* (2), that apply-

(1) Kay, 678. (2) Law Rep. 6 Ch. 822.

ing for an account means for an account for the purpose of settling it. That is the object of the application, and though it does not speak of a balance, I think it is an unqualified acknowledgment which would purport to make him out to be a debtor, from which I cannot help inferring a promise to pay. The case of *Chasemore* v. *Turner* (1) seems to me to be an authority in this case. There there was no reference to a balance; the words were, "The old account has not escaped our memory, and as soon as we get our affairs arranged we will see you paid." That, I think, clearly meant "see you paid the balance, if any, of that account," and the judges treat the words as an absolute acknowledgment of a debt.

HUDDLESTON, B., concurred.

Rule discharged.

Solicitor for plaintiff: *T. W. Payne.*
Solicitor for defendants: *R. T. Wragg.*

DODDS AND ANOTHER *v.* SHEPHERD. *Feb.* 10.

Interpleader—Summary Decision by a Judge at Chambers—Right of Appeal—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *ss.* 14, 17—*Judicature Act*, 1873, *ss.* 19, 50—*Sch., Order I., Rule* 2.

When a judge at chambers disposes of the merits of an interpleader in a summary manner under the Common Law Procedure Act, 1860, s. 14, his decision is, by s. 17, final, and he cannot, even with consent of parties, give a right of appeal to the Court; and no alteration in this respect is made by ss. 19 and 50 of the Judicature Act, 1873, taken together with Order I., Rule 2.

THE plaintiffs having obtained judgment against the defendant and issued execution, the sheriff of Middlesex, on the 11th of January, 1876, seized the defendant's goods under the execution. The goods, which were worth about 24*l.*, having been claimed by a person as assignee in possession under a deed dated the 3rd of August, 1875, an interpleader summons was taken out at Chambers before Lindley, J. The learned judge—after hearing counsel for the claimant and the sheriff, and for the execution creditors who contended that the deed was a bill of sale, and, being un-

(1) Law Rep. 10 Q. B. 500.

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registered, was invalid, and also that the assignee was not in possession at the time of the seizure—took time for consideration, and, on the 26th of January, saying that he had felt great doubts, but that the balance of his mind was in favour of the claimant, made an order "that the execution creditors withdraw from possession of the goods, &c., seized in the action, and that no action be brought in respect of such seizure, the execution creditors to pay possession money."

Feb. 3. *R. V. Williams*, for the execution creditors, moved this Court (Kelly, C.B., and Huddleston, B.) to vary or set aside the order, *Winch* appearing for the claimant, and *Bremner* for the sheriff. The question of the right to appeal being immediately raised, *Williams* urged that the learned judge did not intend his decision to be final, but wished the Court to review it; and the motion was adjourned in order that the counsel might attend again before him. They attended accordingly on the same day, and all consented that there should be an appeal; and Lindley, J., indorsed his order of the 26th of January, "I am of opinion that the deed is a deed for the benefit of creditors within the meaning of the Act, but that, if not, the possession taken under it was a formal possession only—leave to both parties to appeal."

Feb. 10. *R. Vaughan Williams* renewed his motion to vary or set aside the order, and proposed to contend that the deed was void as an unregistered bill of sale, and that the order was wrong; but was desired by the Court to shew that they had jurisdiction to hear the application. The learned judge at Chambers from the first supposed and intended that there should be an appeal, and, in fact, did not make any final decision.

[HUDDLESTON, B. From what passed at Chambers, it must be taken that the learned judge, at the request of one of the parties, undertook to determine the merits in a summary manner under s. 14 of the Common Law Procedure Act, 1860.]

Nevertheless, the learned judge, with the consent of all concerned, gave both parties leave to appeal, and that is enough to give this Court jurisdiction under the Common Law Procedure Act, 1860, without resorting to the Judicature Acts. In effect, the

judge's order was suspended till the opinion of this Court should be given. But, if that be doubtful, the right of appeal from every order made at Chambers to a Divisional Court is clearly given by s. 50 of the Judicature Act, 1873, and the right of appeal from every order made by the High Court or a judge to the Court of Appeal is given by s. 19. The words in s. 19, "save as hereinafter mentioned," apply to specific exceptions mentioned in the Act of 1873, and not to interpleader, with which that Act does not deal. The right of appeal being thus given by the Act, it is not affected by Order I., Rule 2, which touches only "procedure and practice" in interpleader; the right of appeal being neither one nor the other.

C. Scott (*Winch* with him), for the claimant, and *Bremner*, for the sheriff, were not heard.

BRAMWELL, B. I think it perfectly clear that we ought not to hear this application, and that we have no jurisdiction to do so. The object of the Common Law Procedure Act, 1860, was to give, in cases where the amount in question was small, a summary jurisdiction in order to save expenses which the property was not able to bear, and for the same reason it made the decision final. No doubt if both parties desired us to re-hear the case, we might as a sort of arbitrators; but even then I think we ought, in the interest of the public, to refuse to do so. It remains to consider whether we are bound to hear it. Before the Judicature Act, we should certainly not have been. The interpleader came before Lindley, J., at Chambers, under the Common Law Procedure Act, 1860, and he undertook to dispose of it summarily. If he had felt a difficulty in the matter, he might have declined to decide it summarily, or he might—if the question were one of law only—have ordered a special case to be stated for the opinion of the Court, or he might have reserved his judgment and requested the Court to hear the case with him as his assessors; but technically he could not, having decided the matter summarily, give a right of appeal, and at first he did not do so. In my opinion, when he had made the order he was functus officio, and had no further jurisdiction. Then the parties went before him and consented that there should be an appeal, and Lindley, J.,

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being naturally unwilling to prevent his decision being reviewed, and with a view to facilitate this application, indorsed on his order "leave to both parties to appeal." This he had no power to do. As it seems to me, therefore, we should have had before the Judicature Act no power to hear this application, unless, as I have said, as arbitrators, to whom a voluntary jurisdiction was given, and who undertook it.

Then it is said the Judicature Act has given us the power. I am not aware of any authority upon the construction of this part of the Act, but to me it is clear that it does not give us power. The suggestion, as I understand it, is, that the Judicature Act, being contrary to the Common Law Procedure Act, 1860, repeals it, under the general rule that subsequent and contrary statutes repeal earlier ones. That is a good rule, but it does not apply here. The true rule cannot be better expressed than it is in a judgment of Sir Montagu Smith, in *Conservators of the Thames* v. *Hall* (1), where he applies the rule to the special legislation in the Merchant Shipping Act, 1854, as affected by the Thames Conservancy Act, 1857. He says: "The rule, as laid down by Sir Orlando Bridgman (2), is that 'the law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it.'" I read s. 50 of the Judicature Act, 1873, which says: "Every order made by a judge . . . . in Chambers . . . . may be set aside or discharged upon notice by any divisional Court, ..." as laying down a general rule, and not as repealing the particular and special enactment of the Common Law Procedure Act, 1860, that the decision of the judge in a summary manner shall not be appealed from. This view is confirmed—if confirmation is needed—by the reason of the thing. Why should the legislature, when making a general rule with regard to appeal, be supposed to refer to a particular case in which a former statute has said there shall be no appeal, for reasons which are just as applicable now as they were before? Besides s. 50 says that every order made by a judge in chambers may be set aside or discharged by any divisional Court "according to the course and practice of the Division of

(1) Law Rep. 3 C. P. 421.
(2) *Lyn* v. *Wyn*, Bridgman's Judgments, 122, 127.

the High Court to which the particular cause or matter in which such order is made may be assigned." Now there was no "course and practice" applicable to appeals from a summary decision at chambers in interpleader cases.

But further, Order I., Rule 2, says that, "with respect to interpleader, the procedure and practice now used by Courts of Common Law, under the Interpleader Act, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions, and all the Divisions of the High Court of Justice" &c. Mr. Williams ingeniously suggests that the right of appeal is neither "procedure" nor "practice;" but it is impossible to suppose that rule did not intend to incorporate all the appropriate provisions of the two statutes.

I think, therefore, that the Judicature Act has not altered the matter; that we have no jurisdiction; and that we ought not to exercise one, though the parties are willing that we should, because it is for the interest of suitors that a summary decision at chambers should be final.

AMPHLETT, B. I am of the same opinion. It is clear that under the Common Law Procedure Act, 1860, neither the consent of parties nor the judge could give us jurisdiction, because the object of that Act was that where, from the small amount involved it was desirable and right, the judge himself should adjudicate summarily, and further expense be avoided. Therefore, when Lindley, J., thought it was a case in which he ought to exercise his summary jurisdiction, and did exercise it, he had no power to confer on the Court a right to hear an appeal. I think it would be contrary to the public interest to allow these small matters to be opened again.

I entirely agree with Bramwell, B., in his construction of s. 50 of the Judicature Act, 1873. If there had been no previous special enactment prohibiting an appeal, I should think that s. 50 would have given a right of appeal, but I think that section did not intend to confer a right of appeal where the right had been taken away by a former statute.

HUDDLESTON, B. I am of the same opinion. Mr. Williams

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urged that this was a matter in which Lindley, J., had entertained great doubt. But eventually the learned judge decided that the deed of assignment was not a bill of sale, and did not require registration, but was a deed for the benefit of creditors. When this motion first came before the Court Mr. Williams pressed upon us that Lindley, J., wished the Court to review his decision. Mr. Winch, for the claimant, consented to go again before the learned judge, but pointed out that even if the learned judge considered that the deed was a bill of sale, still he might find the fact of possession in favour of the claimant so as to entitle him to the goods. We have the learned judge's indorsement on the order, and it is clear that his decision is final. He could not grant a special case for the opinion of the Court if there were facts in dispute, and here there were facts in dispute.

With regard to Order I., Rule 2, Mr. Arthur Wilson, in a note to that rule, in his edition of the Judicature Acts, p. 158, says: "Sect. 19 of the Judicature Act, 1873, gives an appeal from every judgment or order, 'save as hereinafter mentioned.' As the Amendment Act, 1875, is to be read as one with that Act, and the above rule adopting the procedure under the Interpleader Acts is in the schedule, the case of interpleader may perhaps be held to fall within the words 'save as hereinafter mentioned.' If so, there will still be no appeal in interpleader." So far I agree with Mr. Wilson, but I do not agree with what follows: "But on the other hand it may well be doubted whether the right of appeal properly falls within the words 'procedure and practice' as used in the rule." I entirely agree with what my Brother Bramwell has said upon this.

Motion refused.

Solicitor for plaintiff: *Swaine.*
Solicitor for claimant: *J. T. Wright.*
Solicitor for sheriff: *Maynard.*

STONE AND OTHERS *v.* THE MARINE INSURANCE COMPANY, OCEAN LIMITED, OF GOTHENBURG. 1876 *Jan.* 19.

Marine Insurance—Voyage from Liverpool to Baltimore and United Kingdom —Leave to go to Antwerp—Ultimate Destination of Ship—Arrival at Port —Usual Place of Discharge—Termination of Risk—Intention to insure against unascertained Risk.

The risk on a vessel under a policy of insurance to a place generally, without any provision as to her safety there, continues until she is anchored at her port of destination, in the usual place for discharge of her cargo.

By a memorandum indorsed on a policy made by way of re-insurance on a vessel from Liverpool to Baltimore and United Kingdom, the vessel, in consideration of an additional premium, was to be at liberty to go to Antwerp. On leaving Baltimore she went direct to Antwerp, where she arrived the day before the memorandum was made. Two days after, while in the outer dock, on her way into the inner dock, the usual place of discharge, she was ordered to Leith, on her way to which place she was lost. In an action on the policy or for a return of the additional premium:—

Held, that the memorandum did not give liberty to touch or call at Antwerp, and so did not permit the vessel to go to Antwerp, and thence to England; and that, as the vessel had not, when the memorandum was made, reached the usual place of discharge, the voyage was not then at an end, and the additional premium could not be recovered back.

SPECIAL case, from which the following facts appeared:—

The plaintiffs were underwriters at Lloyds, and the defendants an insurance company established at Gothenburg, but carrying on business by their agents in London.

On the 18th of March, 1873, the owners of the ship *Ravensworth Castle* insured her with the plaintiffs for twelve calendar months from the 11th of March, 1873.

The plaintiffs effected a re-insurance by a policy which was duly made by the defendants, the material part of which was as follows: "300*l.* at 30/ % 4*l.* : 10 : 0 on hull and machinery, being a re-insurance applying to policy No. , subject to the same clauses and conditions as original, and to pay as may be paid thereon, including risk of craft to and from the vessel; a sum of 300*l.* from Liverpool to Philadelphia and United Kingdom against all risks which, according to Lloyd's rules (but with the conditions specially expressed and agreed upon in this policy), can fall upon the company."

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After the policy of re-insurance had been effected the plaintiffs' agent heard that the ship was going to Baltimore instead of Philadelphia, and at his request the defendants' agent initialled the following memorandum on the policy of re-insurance:—"It is hereby agreed to allow the vessel to proceed to Baltimore instead of Philadelphia. London, 1st Nov., 1873."

After the 1st of November, and after the making of the last-mentioned indorsement, the vessel sailed with her cargo for Baltimore, deliverable at that port.

At the time she so sailed her destination beyond Baltimore was not fixed. She duly arrived at Baltimore, and there having discharged her outward cargo, she received from the charterers' agents a cargo of wheat. The greater part of this cargo had been sold for Antwerp by the charterer, and was deliverable at Antwerp to his order.

In December, 1873, the vessel sailed from Baltimore for Antwerp without any intention on the part of the captain, owners, or charterers of proceeding to the United Kingdom on the then voyage, and with the intention of proceeding direct to Antwerp as her port of discharge, in fulfilment of the charter.

At the time of the vessel leaving Baltimore no destination for the vessel beyond Antwerp had been fixed upon, nor was any such destination fixed upon until after her arrival at Antwerp under the circumstances hereinafter mentioned.

On the 1st of January, 1873, the vessel arrived at Antwerp.

On the 2nd of January the plaintiffs' agent learnt that the vessel and her cargo had sailed from Baltimore for Antwerp, and on that day, at his request, the following memorandum was indorsed upon the policy of re-insurance, and initialled on behalf of the defendants:—"In consideration of an additional premium of 7/6 per cent. being paid hereon, and which we acknowledge to have received, it is hereby agreed to allow the vessel to go to Antwerp. 2nd Jan. 1874."

At the time of the negotiation of the agreement eventuating in this memorandum, and at the time of the initialling the same, neither the defendants nor their agents had any knowledge of the destination of the vessel on her leaving Baltimore, or the route she had taken, save what they derived from the entries in *Lloyd's*

Lists, and from the fact that they had learnt that the vessel might possibly go to Antwerp; and the plaintiffs and their agents, and the defendants and their agents, believed that the vessel was at sea.

During the negotiation a conversation, which was tendered in evidence, but rejected subject to the opinion of the Court as to its admissibility, took place between the plaintiffs' and the defendants' agents.

The ordinary rates of insurance from American ports to Antwerp are the same as the rates from American ports to the United Kingdom. The reception of this fact as evidence was objected to by the defendants, and the fact was inserted in the case subject to the opinion of the Court as to its admissibilty in evidence.

Upon the 3rd of January a telegram was sent to the captain, ordering the ship to sail for Leith. This telegram was received by the captain when the vessel was in the outer dock on her way into the inner dock, the usual place of discharge at Antwerp.

Owing to the state of the river at Antwerp, the vessel was unable to leave dock until the 7th of January, 1874. On that day she sailed from Antwerp for Leith, and upon the 9th of January, when on the voyage from Antwerp to Leith, she was totally lost by perils of the sea.

The plaintiffs were obliged to pay to the owners of the ship their proportion of the loss under the primitive policy of insurance.

The first question for the opinion of the Court was, whether or not the defendants were liable to pay to the plaintiffs the sum of 300*l.*

If the Court should be of opinion that the defendants were not so liable, then a further question for the opinion of the Court was, whether the plaintiffs were entitled to a return of the premiums.

Gainsford Bruce (*Benjamin, Q.C.*, with him), for the plaintiffs, contended that the vessel had gone to Antwerp within the meaning of the policy; or, that if Antwerp was to be taken as the final

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port of discharge, the vessel had arrived there before the memorandum was made, and the plaintiff was entitled to recover back the aditional premium. He referred to Duer on Insurance, vol. i. p. 171, and *Preston* v. *Greenwood.* (1)

Butt, Q.C. (*Mansel Jones* and *Stubbs* with him), for the defendants, contrà.

Gainsford Bruce, in reply.

BRAMWELL, B. I am of opinion that our judgment must be for the defendant. It was first contended that under these words, "from Liverpool to Philadelphia and the United Kingdom," the ship might go on some independent voyage which had nothing to do with Philadelphia, as, for instance, to the Cape of Good Hope; but that point was given up. The case turns on the construction of the policy and the two memoranda indorsed on it. These must be read together without reference to the conversation set out in the schedule to the case, and without reference to the premium being the same to England and Antwerp, for the argument founded on that has been answered, one answer being, that the positive intention was that there should be an increase of risk. I am also inclined to mistrust whether we ought to look at the amount of the premium at all to see what was the risk. I think, therefore, we must construe these three documents without reference to evidence of that description. Now, various constructions have been put upon them. One is, that the parties meant that the vessel might go to Antwerp instead of the United Kingdom; the other, that she might go to Antwerp by way of the United Kingdom. It is not necessary to discuss which of these interpretations is right, because neither of them would protect the plaintiff. He must contend that the parties meant this, that the vessel might go to Antwerp, and afterwards sail to England; either having previously discharged her cargo at Antwerp and taken in ballast, or with her cargo, and that the voyage to England would be within the risk. I am quite certain no such thing was in the contemplation of the parties. Vessels that are intended to discharge in England, very rarely, I should say, go to Antwerp for orders.

(1) 4 Doug. 28.

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The true construction seems to me to be, when it is agreed to allow the vessel to go to Antwerp, to give the alternative of going to Antwerp or the United Kingdom, or possibly first to the United Kingdom and afterwards to Antwerp, but not to permit her to go to Antwerp and sail thence to the United Kindom. I think, therefore, that the plaintiff is not entitled to recover on the policy. Then the question is, whether he can recover back his additional premium, and that must depend upon whether the voyage was continuing, or had come to an end at the time of making the memorandum. In my judgment, the voyage was not ended. The vessel's voyage was from the port of departure to her moorings at the port of destination. I do not want to enter into too wide a definition of what is the end of a voyage which might differ under different circumstances, but here the statement in the case, that the telegram was received by the captain when the vessel was in the outer dock, on her way into the inner dock, is conclusive. Was the voyage over when that telegram was received? Something remained to be done which was part of the voyage, or certainly part of the adventure. The matter may be tested in this way. Supposing the sailors had been hired for the voyage, would they have been entitled to leave the vessel in the outer dock? I should say, assuredly not. I quite agree with the statement in Arnould on Insurance (1), that, where there is no clause as to mooring in good safety for any given time, if a vessel got to port and was at moorings waiting her turn to unload, she would have finished her voyage; but that is not the case here. Further than this, even if the voyage had finished, I think the plaintiffs not entitled to a return of the premium. The vessel may have been damaged on the voyage. Further, if the facts had been known, it would have been known there was no risk, but they were not known, and therefore the underwriters took on themselves the hazard of an unknown matter. I think, therefore, the plaintiffs are neither entitled to recover on the policy nor to a return of the premium.

AMPHLETT, B. I am of the same opinion. There was, originally

(1) 4th Edit. p. 389.

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a time policy covering voyages to any part of the world, with certain restrictions. Before the re-insurance was made the places to which the ship was not to go were altered. That, no doubt, increased the risk, and the plaintiffs were minded to decrease it by re-insurance. They did not, however, take the re-insurance to cover the same risk, but they so express the risk insured against as to cover a voyage-policy. Then a memorandum is introduced in which it is said that the vessel is to proceed to Baltimore instead of to Philadelphia; it still remained a re-insurance for a particular voyage. Then it appears that the vessel was intended to go to Antwerp, and the plaintiffs, having learnt this, determined to make a corresponding alteration in their counter-insurance, and they went to the insurers and got this memorandum: "It is hereby agreed to allow the vessel to go to Antwerp;" on which the question turns. This appears to me to be different from liberty to touch at Antwerp, in which case the vessel might go beyond that port. The intention of allowing the vessel to go to Antwerp might be either that she should go there direct from Baltimore or by way of the United Kingdom; most probably the latter. Either way, Antwerp is substituted for a port of the United Kingdom as the place arrival at which terminates the risk. Then on the question whether the additional premium ought to be returned because the vessel had arrived at her final port of discharge before the additional premium was paid, like the case we had before us of insurance on the life of a man who was dead, where there was an entire failure of consideration, Antwerp being the port of discharge, the vessel cannot be said to have safely arrived at her port of discharge till she is safely moored at Antwerp for discharging. It is found in the case that the captain was in the act of moving to the usual place of discharge, and there was therefore a modicum of risk remaining which prevents the plaintiffs requiring the return of the premium. In Phillips on Insurance, paragraph 969, it is said that the risk on a vessel under a policy to a place generally without any provision as to her safety there, terminates on the vessel being safely anchored at her port of destination, in the usual place and manner; and this, I think, is the correct rule. The defendant is therefore entitled to the verdict on both points.

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HUDDLESTON, B. I am of the same opinion. I think the insurance was from America to the United Kingdom and thence to Antwerp, where it ceased. As to the other point, the case of *Samuel* v. *Royal Exchange Assurance Co.* (1) is almost conclusive. The question there was whether the voyage had terminated under a policy by which the vessel was insured until she arrived at London and moored at anchor twenty-four hours in safety. The evidence was that she arrived at Deptford and was moored alongside a king's ship, near the dock-gates of the King's Dock, where she was to deliver her cargo. There was evidence that many vessels laden with timber discharged their cargoes at the place where the vessel was moored, and on this it was contended that the place where she was moored must be considered as the place of her destination, in which case she had been in safety for twenty-four hours before the loss. Lord Tenterden, however, said it was manifest that there never was an intention to discharge the cargo there, and so that ground of defence failed. That seems to me to be an authority distinctly applicable to the present case, to shew that the voyage had not come to an end when the vessel was in the outer dock at Antwerp.

Judgment for the defendants.

Solicitor for plaintiffs: *William Flux.*
Solicitors for defendants: *Druce, Sons, & Jackson.*

(1) 8 B. & C. 119.

1876
Feb. 3.

[IN THE COURT OF APPEAL.]

ELEY *v.* THE POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED.

Company—Articles of Association—Appointment of Solicitor—Public Policy.

Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and should not be removed from his office, unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff acted as solicitor to the company for some time, but ultimately the company ceased to employ him and employed other solicitors. The plaintiff brought an action against the company for breach of contract in not employing him as solicitor to transact their legal business on the terms of the articles :—

Held, that the articles of association were a matter between the shareholders inter se, or the shareholders and the directors, and did not create any contract between the plaintiff and the company.

APPEAL from a decision of the Exchequer Division in favour of the defendants on a special case, reported, ante, p. 20, where the facts are stated.

Benjamin, Q.C., and *D. Kingsford*, for the plaintiff, appellant, contended that the articles of association formed a contract on which the plaintiff could sue the company, and referred to *Orton* v. *Cleveland Fire Brick Co.* (1); *Mair* v. *Himalaya Tea Co.* (2); *Melhado* v. *Porto Alegre Ry. Co.* (3)

They also contended that if not a contract in itself, Art. 118 was an offer of employment which came to the plaintiff's knowledge, and which he accepted and acted under. There was, therefore, evidence of an employment on the terms of the article on which the plaintiff could sue. They referred to *Touche* v. *Metropolitan Railway Warehousing Co.* (4)

They also contended that such a contract need not be in writing, and referred to *Wells* v. *Horton* (5); *Emmens* v. *Elderton.* (6)

(1) 3 H. & C. 868.
(2) Law Rep. 1 Eq. 411.
(3) Law Rep. 9 C. P. 503.
(4) Law Rep. 6 Ch. 671.
(5) 4 Bing. 40.
(6) 4 H. L. C. 624.

Finlay, for the defendants, was not called on.

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LORD CAIRNS, L.C. I wish to say, in the first place, that in my opinion a contract of the kind suggested to exist in this case ought not to receive any particular favour from the Court. The statement is that Baylis was endeavouring to form a joint stock insurance company upon a new principle, and applied to the plaintiff to make advances to meet the expenses of getting up the company, and it was arranged between them that in the event of the company being formed the plaintiff should be appointed permanent solicitor to the company. That is to say, a bargain is made between a professional man and Baylis which, so far as the case is concerned, does not appear to have been communicated to those who were invited to join the company, that if the former will advance money for the formation of the company, he shall be appointed permanent solicitor, and the company shall be obliged to employ him as their professional adviser. When the articles are prepared, they are so by the plaintiff, and in them he inserts a clause which no doubt informs those who signed the articles of the arrangement, but does not appear to have been brought to the notice of those who joined from receiving circulars. This, I repeat, is not a proceeding which the Court would encourage in any way.

I also wish to reserve my judgment as to whether a clause of this kind is obnoxious to the principles by which the Courts are governed in deciding on questions of public policy; but it does appear to me a grave question whether a contract under which a solicitor is not bound to give any particular services, but the company, on the other hand, are bound to employ him for all their business, and to continue to do so, however incompetent he may prove to be in point of physical health or otherwise, until they can convict him of some positive misconduct, is a contract which the Courts would enforce. I prefer to reserve my judgment on the validity of such an agreement until a case arises which calls for a decision on that point.

This case was first rested on the 118th Article. Articles of association, as is well known, follow the memorandum, which states the objects of the company, while the articles state the arrangement between the members. They are an agreement inter

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socios, and in that view, if the introductory words are applied to Art. 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is res inter alios acta, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against the company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff.

The matter has been put in another way. It is said, this, though not an agreement in itself, is at all events a statement of what had been agreed upon; it must have been intended to be brought to the plaintiff's knowledge, he has accepted and acted upon it, and therefore it is evidence of another agreement on which he can rely. Now it may be considered that Art. 118 would have warranted the directors in entering into an agreement with the plaintiff by which they should contract to employ the plaintiff; but I ask, was such a contract ever made? A joint stock company may act under their seal, or by the signature of their directors, which may have equal effect as their seal, or possibly by a resolution of the board. Nothing of the kind exists here; and if the article is not an agreement on which the plaintiff can rely, there is nothing in the case before us but the fact of his employment, and that would entitle him to remuneration only for work he has done. This seems to us to dispose of the whole of the case; and I think that, irrespective of any question on the Statute of Frauds, the judgment of the Court below must be affirmed.

LORD COLERIDGE, C.J., and MELLISH, L.J., concurred.

Judgment affirmed.

Solicitor for plaintiff: *Plaintiff in person.*
Solicitors for defendants: *Tucker, New, & Langdale.*

RIDING *v.* SMITH.

1876
Jan. 11.

Defamation—Words spoken of an Assistant to a Trader—Injury to Business resulting therefrom—Special Damage—General Evidence of Loss of Trade.

Action by a trader charging that the defendant falsely and maliciously spoke and published of the wife of the plaintiff, who assisted him in his business, and in relation to such business, certain words charging her with having committed adultery upon the premises where the plaintiff resided and carried on business, whereby the plaintiff was injured in his business, and certain specified persons and others who had theretofore dealt with him ceased to do so:—

Held, that the action was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop:

Held, also, that special damage might be proved by general evidence of the falling off of the plaintiff's business, without shewing who the persons were who had ceased to deal with the plaintiff, or that they were the persons to whom the statements were made.

THIS was an action tried before Pollock, B., at the winter assizes at Manchester, in 1874.

The action was originally brought by the plaintiff and his wife Margaret. The first count of the declaration charged that the present plaintiff was a grocer and draper, and that his wife assisted him in the conduct of his business, and that the defendant falsely and maliciously published of the plaintiff's wife, in relation to the business and her conduct as such assistant in the same, certain words imputing to her the commission of adultery with one Joseph Abbott upon the premises where the plaintiff resided and carried on business, whereby the plaintiff was injured in his credit, and certain persons named and many others who had dealt with him ceased to do so.

The second count charged injury to the credit and reputation of the plaintiff's wife Margaret.

The third count was by the now plaintiff in his own right, and charged that he carried on business as a grocer and draper, and was assisted in the conduct of the same by his wife Margaret, as in the first count mentioned, and thereupon the defendant falsely and maliciously spoke and published of the said Margaret the words in the first count mentioned, whereby the plaintiff was

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injured in his business as a grocer and draper, and the persons named and many others ceased to deal with him.

The defendant pleaded not guilty and a justification.

In the course of the trial the name of the plaintiff's wife as a party to the action was struck out, and the first and second counts were abandoned and struck out.

At the trial it was proved that the words complained of were uttered in the presence of three or more persons. The person to whom they were addressed was on her way to the church of the district, where Joseph Abbott, who had been appointed to the incumbency, was about to read himself in. No evidence was given that any of the persons who heard the statement of the defendant had ceased to deal with the plaintiff, nor was there any evidence that particular persons had ceased to deal with the plaintiff, but there was evidence of a falling off in the profits of the business since the publication of the words complained of, and the plaintiff was unable to account for this falling off except as the consequence of the statements.

A verdict was found for the plaintiff for 40*s.*, but leave was reserved to the defendant to move to enter a verdict for him or a nonsuit.

A rule nisi was accordingly obtained to enter a nonsuit or a verdict for the defendant on the ground that there was no evidence of special damage, or any damages sufficient to entitle the plaintiff to maintain the action, and to arrest the judgment on the ground that there was no sufficient statement of special damage or damages in the declaration to make the action maintainable, and even if there was, that the action was not maintainable at the suit of the plaintiff in respect of the alleged slanders on the wife.

Ambrose, Q.C. (*H. W. Worsley* with him), shewed cause, but was stopped by the Court.

Pope, Q.C., and *Crompton*, in support of the rule, contended that the action was not maintainable. The words not being actionable in themselves as slander of the wife, cannot be made so in a suit by the husband. The point was suggested in *Saville* v. *Sweeny* (1),

(1) 4 B. & Ad. 514.

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and its never having been raised since is against it. Even if actionable with special damage, the damage to the plaintiff by the loss of custom arising from the repetition of the words is too remote. In *Parkins* v. *Scott* (1) Pollock, C.B., said: "*Ward* v. *Weeks* (2) decided that where the words are not actionable per se the original utterer of the slander is not liable, unless either the person who was influenced by them was present and heard them spoken, or the utterer authorized their repetition." *Dixon* v. *Smith* (3) is to the same effect. Further, the allegation of special damage failed. It was not shewn that either of the persons named in the declaration had ceased to deal with the plaintiff, nor was it shewn that they were present when the slander was uttered.

KELLY, C.B. I am of opinion that this rule should be discharged. At the trial, as the declaration originally stood, it was necessary to shew that the slander was actionable either in itself, or else by reason of some special damage arising from it. But in the course of the case it was agreed that the wife of the plaintiff should be dismissed from the action, which then remained in substance not slander, but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff. The action is this, that the defendant stated in the hearing of divers persons that the wife of the plaintiff, who assisted him in carrying on his business, had been guilty of adultery, so that customers ceased to deal at the shop. The two questions are, first, whether such an action is maintainable at all; and, secondly, whether it can be maintained without proof of something of the same kind as the special damage that would have to be proved in an action for slander. It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander, or whether it is a statement of any other

(1) 1 H. & C. 153; 31 L. J. (Ex.) 331.
(2) 7 Bing. 211.
(3) 5 H. & N. 450.

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nature calculated to prevent persons resorting to the shop of the plaintiff. Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is, whether such a statement would be actionable without proof of special damage. That was requisite in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present. The cases shew that in an action in respect of a statement made as to the wife or assistant of the plaintiff, the words would not be actionable as slander without proof of special damage, which must be established not merely by general evidence that the business has fallen off, but by shewing that particular persons have ceased to deal with the plaintiff. I hope the day will come when the principle of *Ward* v. *Weeks* (1) and that class of cases shall be brought under the consideration of the Court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part.

Evans v. *Harries* (2) is an authority that, in an action for slander for words spoken of the plaintiff in his trade or business, it is competent for him to prove a general loss of custom, although the declaration has alleged the loss of particular customers as special damage. So, here, I think it is sufficient to shew that from the time of the injury being done the business has fallen off, and that it is unnecessary to prove that any particular persons have ceased

(1) 7 Bing. 211. (2) 1 H. & N. 251; 26 L. J. (Ex.) 31.

to deal with the plaintiff. On both grounds, therefore, I think the plaintiff is entitled to succeed, and the rule must be discharged.

POLLOCK, B. I am of the same opinion. The first question raised by the rule is, whether there is any evidence of special damage or any damages sufficient to entitle the plaintiff to maintain this action, that is, whether the course taken at the trial in admitting general evidence that the plaintiff's custom had fallen off was right. If this were an action of slander, the case of *Evans* v. *Harries* (1) would be in point, and I think it clear that where the nature of the business is such and the nature of the words spoken such as not to admit of the production of evidence that particular persons have been in consequence of a particular communication to them prevented from dealing with the plaintiffs, there general evidence is admissible. Then comes the more important question, are the words spoken actionable, and are they shewn to have been so spoken as to be a sufficient cause of action? I am of opinion that they are. The Courts have at all times been extremely careful as to verbal slander, but where you find that the nature of the words is such that damages would naturally follow from their being uttered, and that damage has arisen, then there is a cause of action. The decision in *Ward* v. *Weeks* (2) is not applicable to a case like the present. In that case there was a specific allegation that a particular person, John Bryer, had declined to supply the plaintiff with goods on credit. Tindal, C.J., said that such a spontaneous and unauthorized communication as there took place, namely, the repetition of the words, which was the voluntary act of a free agent, could not be considered as the necessary consequence of the original uttering of the words. The facts of this case are different. The words were spoken on a public occasion when the clergyman was about to read himself in, in order that he might become the incumbent of the parish, and the defendant, in the presence of four persons at least, uttered words with regard to his conduct with the wife of the plaintiff. I think, therefore, that *Ward* v. *Weeks* (2) is not an authority applicable to this case, and that the action is maintainable.

(1) 1 H. & N. 251; 26 L. J. (Ex.) 31.

(2) 7 Bing. 211.

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HUDDLESTON, B. I am of the same opinion. The declaration when amended would stand thus: that the plaintiff carried on business as a grocer and draper, and was assisted in the conduct of his business by his wife, and that the defendant falsely and maliciously published of the plaintiff's wife in relation to the business that she had committed adultery, whereby the plaintiff was injured in his business and sustained special damage. I think it clear that on a declaration so framed an action might be maintained. Then there is the question whether the allegation of special damage can be supported by general proof. This has been held in several cases, and Martin, B., in *Evans* v. *Harries* (1), pointed out the impossibility of a shopkeeper indicating the particular customers whom he has lost, as he does not know them. Here there was evidence of loss of custom, and the plaintiff can assign no reason for it except the slander. I will only add that in *Parkins* v. *Scott* (2), Bramwell, B., expressed his entire concurrence in the law as laid down in *Ward* v. *Weeks*. (3) I think, therefore, that the action was maintainable and the evidence sufficient, and the rule must be discharged.

Rule discharged.

Solicitors for plaintiff: *Johnson & Weatheralls, for Charles Hall, Accrington.*

Solicitors for defendant: *Le Riche & Son, for G. W. Barlow, Accrington.*

(1) 1 H. & N. 251; 26 L. J. (Ex.) 31.

(2) 1 H. & C. 153; 31 L. J. (Ex.) 331.

(3) 7 Bing. 211.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

1876
Jan. 28.

RUTHER, APPELLANT; HARRIS AND ANOTHER, RESPONDENTS.

Salmon Fishery Act, 1861 (24 & 25 *Vict. c.* 109), *s.* 21—*Forfeiture of Net.*

By s. 21 of 24 & 25 Vict. c. 109, "No person shall fish for, catch, or kill by any means other than a rod and line any salmon between 12 o'clock at noon on Saturday and 6 o'clock on Monday morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or moveable instrument used by him in taking the same."

The respondents fished for salmon with a net during the prohibited hours, but they did not catch any fish:—

Held, that the net having been used for the purpose of taking salmon, it had become forfeited.

CASE stated by justices of Gloucestershire under 20 & 21 Vict. c. 43.

The respondents were summoned by the appellant, a water-bailiff of the Severn fishery district, on an information under the "Salmon Fishery Act, 1873" (36 & 37 Vict. c. 71), charging that the respondents did resist and obstruct the appellant in the execution of his duty as such water-bailiff.

It appeared at the hearing that the appellant was duly appointed a water-bailiff of the Severn fishery district; that, before 6 o'clock a.m. on Monday, the 10th of May, 1875, at Lydney, within the Severn fishery district, the appellant, with another water-bailiff and a police officer, found the respondents and other persons fishing for salmon in the river Severn, with nets used for catching salmon; that the appellant demanded one of the nets from the respondent Harris, but Harris refused to give it up; both the respondents knew that the appellant was a duly-appointed water-bailiff; that the appellant attempted to seize the net, but the respondents resisted and obstructed him and prevented his seizing the net. It was not proved that the respondent Harris had actually caught any salmon, but the respondents were, during the weekly close time, contrary to s. 21 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), in the river Severn fishing for salmon by other means than a rod and line, and had with them nets for

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catching salmon, and for this offence they had been convicted before the same justices.

It was contended on behalf of the respondents, that a water-bailiff had no authority under the Salmon Fishery Acts, 1861 to 1873 (1), to seize any net or moveable instrument used in fishing for salmon during the weekly close time, unless salmon had been actually caught therein; that s. 36, subs. 3, of the Salmon Fishery Act, 1873, only authorized the water-bailiff to seize all fish and other articles forfeited in pursuance of the Salmon Fishery Acts, 1861 to 1873, and that s. 21 of the Salmon Fishery Act, 1861, only provided that a person acting in contravention thereof should forfeit all fish taken by him, and any net or moveable instrument used by him in taking the same, and that as it was not proved that any salmon was actually taken, no forfeiture arose.

It was contended, on behalf of the appellant, that the instruments were forfeited by any one acting in contravention of s. 21 of the Salmon Fishery Act, 1861, and that section forbade not only the catching and killing but also the fishing for salmon; and that it having been proved that the respondents were acting in contravention of this section, the net was thereupon forfeited and liable to seizure.

The justices dismissed the summons.

The question was, whether the net was an instrument forfeited under the Salmon Fishery Acts, 1861 to 1873.

Willis Bund, for the appellant. The net was forfeited, for it is

(1) By 24 & 25 Vict. c. 109, s. 21, "No person shall fish for, catch, or kill, by any means other than a rod and line, any salmon between the hour of 12 of the clock at noon on Saturday and the hour of 6 of the clock on Monday morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or moveable instrument used by him in taking the same, and in addition thereto shall incur a penalty not exceeding 5*l.* and a further penalty not exceeding 1*l.* in respect of each fish so taken between 12 of the clock at noon on Saturday and 6 of the clock on Monday morning. . ." By 28 & 29 Vict. c. 121, s. 27, water-bailiffs may be appointed. By 36 & 37 Vict. c. 71, s. 36, any water-bailiff appointed under the Salmon Fishery Acts, 1861 to 1873, acting in the limits of his district, may do all or any of the following things: By subs. 3, "seize all fish and other articles forfeited in pursuance of the Salmon Fishery Acts, 1861 to 1873."

not necessary that a salmon should be caught before the bailiff can seize. Sect. 21 of the Salmon Fishery Act, 1861, prohibits not only the catching and killing, but also the fishing for salmon, and a forfeiture of the net is imposed on any person acting in contravention of this section; the respondents were acting in contravention of the section by fishing for salmon, and the net that they were using was employed in furtherance of their illegal purpose and was liable to forfeiture. The appellant was therefore right in attempting to seize it under s. 36, subs. 3, of the Salmon Fishery Act, 1873.

The respondents did not appear.

CLEASBY, B. The question for our determination is whether the net which the appellant attempted to seize had been forfeited by force of the 21st section of the Salmon Fishery Act, 1861; and its solution depends entirely upon the construction of that enactment. A net is to be forfeited if it is used in contravention of the section; and it appears to us to be the more rational course not to limit its provisions to cases where a salmon has been actually caught. No doubt the language at first sight appears to bear only the meaning put upon it by the justices; and we are bound to see that the construction contended for by the appellant's counsel is clearly established; but I think that the section must mean that the net or moveable instrument is to be forfeited if it is used for the purpose of taking salmon. The 21st section forbids "fishing for" salmon during a certain portion of the week; the respondents fished during the prohibited time, and, therefore, they were clearly acting in contravention of the statute. It follows that the net which they were using was forfeited. The decision of the justices was erroneous.

GROVE, J. I am of the same opinion. It may be said that to some extent the offence is tied up with forfeiture; and it appears to me not to be open to doubt that a person would be acting in contravention of the section merely by fishing for salmon, and would thereby incur a penalty; but if the justices were right it would seem to follow that no penalty is imposed unless the fish is actually taken. I think that the words "used by him in taking the same"

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must mean "used for the purpose of taking the same," and apply when persons are unlawfully fishing for salmon with a net. It is no doubt a rule of interpretation that the grammatical construction of a sentence must be followed, but this is not to be adopted when it leads to difficulty. I think it plain that the language of the section is not strictly accurate and grammatical; and in my opinion it was intended that the net should be forfeited and the penalty incurred whenever persons were unlawfully using it in fishing, although no salmon might be caught.

FIELD, J., concurred.

Case remitted to justices.

Solicitor for appellant: *Hugh C. Godfray.*

Jan. 28.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

STEVENS, APPELLANT; EMSON, RESPONDENT.

Occasional Licence for Sale of Intoxicating Liquors—Consent of Justice—Irregularity in obtaining Licence—25 & 26 *Vict. c.* 22, *s.* 13—26 & 27 *Vict. c.* 33, *s.* 20, *subs.* 1.

By 25 & 26 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, subs. 1, an occasional licence for the sale of intoxicating liquors is to be granted by an officer of excise upon the written consent of a justice "usually acting at the petty sessions or the petty sessional division within which the place of sale is situate."

The appellant obtained from a duly authorized officer of excise an occasional licence for the sale of intoxicating liquors; the justice who signed the written consent did not usually act for the petty sessional division within which the place of sale was situate. The appellant having sold intoxicating liquors at the time and place mentioned in the occasional licence, was convicted by justices of selling intoxicating liquors without a licence. It was not proved that the appellant had acted otherwise than bonâ fide:—

Held, that although an irregularity had been committed in obtaining the licence, yet it protected the appellant from penal consequences, and that the conviction was wrong.

CASE stated by justices of Somersetshire under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, charging that the appellant on the 21st of July, 1875,

did sell intoxicating liquors by retail, not having a licence duly authorizing him so to do.

Upon the hearing it was proved on the part of the respondent that the appellant, who was a licensed victualler carrying on business at Bristol, on the 21st of July, 1875, on the occasion of an "Odd Fellows" fête, sold intoxicating liquors in a tent erected in a field situate at Chew Magna, and within the petty sessional division of Temple Cloud. He had obtained an occasional licence from the duly authorized officer of excise, pursuant to the written consent of W. H. Miles, a justice of the peace for the county. The licence purported to empower the appellant to sell intoxicating liquors on the day and at the place above mentioned. The consent described Miles as "a justice of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale . . . . is situated." It was contrary to the fact that Miles usually acted for the petty sessional division within which the place of sale was situate. The justices convicted the appellant.

The question for the opinion of the Court was whether the sales under the occasional licence obtained as above mentioned were illegal.

Arthur Charles, for the appellant. The conviction was wrong. The licence was valid under 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, subs. 1 (1), although a mistake may have been com-

(1) By 25 Vict. c. 22, s. 13, "It shall be lawful for the commissioners of inland revenue, whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorize any officer of excise to grant to any person who shall be duly authorized to keep a common inn, alehouse, or victualling house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this Act empowering him to sell the like articles for which he shall have taken out such licences as aforesaid at any such other place and for and during such space or period of time not exceeding three consecutive days at any one time as the said commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein."

By 26 & 27 Vict. c. 33, s. 20, subs. 1, the consent of one justice is substituted for that of two.

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mitted in the mode of obtaining it: if the appellant had acted fraudulently, the case might be different. Whilst the licence existed, it gave full protection to the holder. It would be wrong to convict the appellant, who acted bonâ fide.

The respondent did not appear.

CLEASBY, B. I am of opinion that the contention of the appellant's counsel is correct. I do not think that the legislature meant to render void an occasional licence, because a mere irregularity is committed. Here the consent of the proper justice was not obtained, and the 25 Vict. c. 22, s. 13 was not complied with; but as there is no proof of fraud, I think the licence protected the appellant.

GROVE, J. I am of the same opinion, although I confess I should have been better pleased if the respondent had been represented by counsel.

FIELD, J., concurred.

Judgment for the appellant. (1)

Solicitors for the appellant: *Gregory, Rowcliffes, & Co.*

Jan. 28.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

BARNES, APPELLANT; EDDLESTON, RESPONDENT.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), s. 343—*Liability under Repealed Enactment—Prohibition of Recurrence of Nuisance.*

By s. 343 of 38 & 39 Vict. c. 55, which came into force on the 11th of August, 1875, 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, are repealed, with a proviso that "this repeal shall not affect any right or liability acquired, accrued, or incurred under any enactment hereby repealed."

An order under 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, to discontinue

(1) The decision in this case seems to be supported by the opinions expressed by some of the judges of the King's Bench in *Rex* v. *Bryan*, Andr. 81; see also *Rex* v. *Price*, Caldecott, 305: cited in Paley on Sum. Con. 143 (5th ed.).

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the sending forth of black smoke from a certain chimney in such quantity as to be a nuisance was made by justices and served on the respondent on the 24th of May, 1875. On the 12th of August, 1875, black smoke was emitted from the chimney in such quantity as to be a nuisance. The respondent having been summoned before justices for a disobedience of the order, they dismissed the summons upon the ground that the statutes under which the order was made had been repealed on the 11th of August.

Held, that the order was a "liability" within the proviso in 38 & 39 Vict. c. 55, s. 343, that it continued in force notwithstanding the repeal of the statutes under which it was made, and that the decision of the justices was erroneous.

CASE stated by justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

The respondent was summoned to answer an information laid by the appellant charging that the respondent had not obeyed a certain order, dated the 15th of May, 1875, and made by two justices under ss. 12 and 13 of the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), and ss. 19 & 20 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90). (1)

(1) By s. 12 of the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), the local authority may cause complaint of a nuisance to be made before a justice of the peace; "and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists . . . . or if removed or discontinued since the notice was given that it is likely to recur or to be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier, for the abatement or discontinuance or prohibition of the nuisance." Sect. 13, after containing directions as to the order of abatement, enacted that "if the justices are of opinion that such or the like nuisance is likely to recur, the justices may further prohibit the recurrence of it."

By s. 14, "Any person knowingly and wilfully acting contrary to the said order of prohibition shall be liable for every such offence to a penalty not exceeding twenty shillings per day during such contrary action."

By 23 & 24 Vict. c. 77, s. 13, upon the complaint of an "inhabitant of any parish or place of the existence of any nuisance on any private premises in the same parish or place," justices might proceed as in cases where complaint was made by a local authority under s. 12 of the Nuisances Removal Act, 1855.

By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 14, the expression "Nuisances Removal Acts" was declared to mean 18 & 19 Vict. c. 121, and 23 & 24 Vict. c. 77.

By s. 19, the word "nuisances," under the "Nuisances Removal Acts,"

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At the hearing it was proved and admitted that the order was duly served on the respondent on the 24th of May, 1875. It recited that a complaint had been made by the appellant that the respondent unlawfully did send forth black smoke from a chimney belonging to certain premises occupied by him, not being the chimney of a private dwelling-house, in such quantity as to be a nuisance, and the nuisance was caused by the act or default of the respondent and was likely to recur. The order, after finding the foregoing recitals to be proved, directed that the respondent should discontinue the nuisance, and prohibited the recurrence thereof. It was also proved and admitted that on the 12th of August, 1875, dense black smoke was emitted from the chimney mentioned in the order in such a quantity as to be a nuisance.

The respondent contended that, inasmuch as on the 11th of August, 1875, the Public Health Act, 1875 (38 & 39 Vict. c. 55), had come into operation and had repealed the 18 & 19 Vict. c. 121, and also that part of 29 & 30 Vict. c. 90, by virtue of which the order of the 15th of May, 1875, was made, and the offence alleged having been committed on the 12th of August, and after the repeal of the last-named statutes, the information was not a legal proceeding in respect of a penalty incurred before the repeal of those enactments. The appellant contended that inasmuch as the order of the 15th of May, 1875, was something "duly done" under one

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included "any chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91, and the following sections contain provisions similar to the foregoing enactments. Sect. 343 repeals, amongst other statutes, 18 & 19 Vict. c. 121, and that part of 29 & 30 Vict. c. 90, by virtue of which the order above mentioned was made, with a proviso that "this repeal shall not affect (*a*) anything duly done or suffered under any enactment hereby repealed; or (*b*) any right or liability acquired, accrued, or incurred, under any enactment hereby repealed . . . . or (*d*), any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; or (*e*), any investigation, legal proceeding, or remedy, in respect of any such right, liability . . . . penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not been passed.

of the repealed enactments, and as the hearing of the summons was "a legal proceeding in respect of a penalty incurred" against one of the repealed enactments, such investigation and legal proceedings might be carried on as though the Act of 38 & 39 Vict. c. 55, had not been passed, and that the respondent ought to be convicted. The justices dismissed the summons.

Anstie, for the appellant. The order was lawfully made and was intended to be permanent; it was therefore in force at the time of the coming into operation of the Public Health Act, 1855, and that statute has not affected it, because s. 343, subs. (*b*), preserves every "liability" incurred under a repealed enactment. Here the order imposed upon the respondent a duty which he was bound to perform; he was in a different position from the rest of the Queen's subjects and was under a special obligation; he was therefore under a "liability" within the meaning of the saving clause. The word cannot mean merely the penal consequence for a breach of a repealed enactment; for that would be met by "a penalty, forfeiture, or punishment" under subs. (*d*).

Maule, Q.C., for the respondent. The order created no "liability" within the meaning of the saving clause; the word there means exposure to penal consequences for a wrongful act committed whilst the repealed acts were still in force. The order can have no greater force than a statute; under a statute no liability is incurred until it is broken, and similarly under the order no liability arises until it is contravened; here, therefore, no liability existed upon the 11th of August, which could be preserved by the saving clause. The sections under which the order was made are in effect re-enacted in the Public Health Act, 1875, and it could not be the intention to preserve them by the saving clause.

Anstie in reply.

CLEASBY, B. It appears to me that the appeal ought to be allowed. The question turns upon the Public Health Act, 1875, s. 343, which repeals many prior enactments; it contains, however, several subsections which preserve portions of the statutes thereby abrogated. The effect of the saving clauses is that for all

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purposes the unrepealed portions remain just as if the Public Health Act, 1855, had not been passed. I need not say that the order is a thing "duly done" within the meaning of subs. (*a*), as appears to have been contended before the justices; but I think it created a "liability" which subs. (*b*) has preserved. The respondent was liable to a penalty upon breach of its directions, as is plain from the express words of the Nuisances Removal Act, 1855, s. 14; and his position seems to me to be unaffected by the repeal of the statute under which it was made. The counsel for the respondent has contended that "liability" means only exposure to penal consequences for an act done during the existence of the repealed enactments. I cannot agree with this narrow construction; but I may remark that the respondent had committed a breach of the law during the existence of the repealed enactments, and that breach justified the making of the order under which the liability was created. The case must be remitted to the justices with an intimation that their decision was erroneous.

GROVE, J. I have had some doubt, but not sufficient to induce me to dissent from the judgment of my learned Brothers.

FIELD, J. I agree with the view of my Brother Cleasby.

Case remitted to justices.

Solicitors for appellant: *Layton & Jaques, for Holroyde & Smith, Halifax.*

Solicitors for respondent: *Bower & Cotton.*

GLEAVES *v.* MARRINER.

1876
Feb. 14.

Ecclesiastical Dilapidations Act, 1871 (34 & 35 *Vict. c.* 43), ss. 29, 53—*Avoidance of Benefice—Dilapidations—Time for Surveyor to make his Inspection and Report.*

Within three calendar months after the avoidance of a benefice by resignation the bishop of the diocese directed the surveyor to inspect the buildings which were out of repair. After the expiration of the three months the surveyor inspected and reported to the bishop, who thereupon, under the Ecclesiastical Dilapidations Act, 1871, made an order for the cost of the repairs. The new incumbent having brought an action upon the order against the late incumbent, the latter pleaded that the surveyor neither inspected nor reported within the three months limited by s. 29 :—

Held, that this was no defence to the action, for the three months mentioned in the section refer not to the surveyor's inspection and report, but to the bishop's direction to the surveyor.

Quære, whether, even as to the bishop, the section is more than directory.

THE declaration alleged that, before the making of the order hereinafter mentioned, the defendant was the incumbent of the benefice of Silsden, and, as such, was seised of certain buildings and premises, and after the 1st of August, 1871 (the commencement of the Ecclesiastical Dilapidations Act, 1871), the benefice became avoided by the resignation of the defendant, who thereupon became the late incumbent thereof within the meaning of the Act, and the plaintiff afterwards became the new incumbent within the meaning of the Act; that, at the time of the defendant's resignation, the buildings and premises were dilapidated and out of repair, and the defendant was liable to make good the dilapidations, and thereupon, and within three calendar months after the avoidance of the benefice, the bishop of the diocese directed the surveyor of the diocese to inspect, and the surveyor inspected the buildings of the benefice, and reported to the bishop that the sum of 314*l.* 13*s.* was required to make good the dilapidations to which the defendant was liable as aforesaid: that afterwards, and after consideration of the whole matter, the bishop duly made an order in compliance with the Act, and thereby stated the repairs and their cost, amounting to 314*l.* 13*s.*, to which the defendant was liable: that all conditions had been fulfilled, &c., necessary to entitle the plaintiff to have the defendant pay the 314*l.* 13*s.*

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and to maintain this action, yet the defendant had not paid it, or any part.

Pleas: 2. That the surveyor did not inspect the buidings within three calendar months after the avoidance.

3. That the surveyor did not report to the bishop what sum was required to make good the dilapidations for which the defendant was liable within three calendar months after the avoidance.

Demurrer to the pleas and joinder.

Cave, Q.C. (*F. H. Scott* with him), for the plaintiff. The pleas are bad on two grounds, either of which is sufficient to support the demurrer: 1. The limitation of three months imposed by s. 29 of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43 (1)), refers, both in grammar and sense, to the bishop alone. It cannot apply to the surveyor, for if the bishop were at a great distance at the time of the avoidance, it might be impossible to communicate with him in time for the surveyor to inspect and report within the three months. 2. The section is only directory, not imperative, otherwise the plaintiff's remedy would be barred by a delay in those over whom he has no control, for, by s. 53, he can only recover upon an order.

The Court then called on

Manisty, Q.C. (*Forbes* with him), for the defendant. Before the Act, the practice was to settle the question of dilapidations immediately after the death of the incumbent, and the Act was merely in substitution of the old practice. The object of the Act

(1) Sect. 29: "Within three calendar months after the avoidance of any benefice after the commencement of this Act, unless the late incumbent shall under this Act be free from all liability to dilapidations, the bishop shall direct the surveyor who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable. . . . ."

Sect. 30—35 regulate the sending in of the surveyor's report and the making of the order by the bishop.

Sect. 36: "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable at law or in equity."

Sect. 53: "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this Act, and to which this Act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this Act."

is to insure a speedy inspection and report, and for the obvious reason that dilapidations increase by time, and the liability of the estate of the late incumbent will be indefinitely larger if the time for inspecting is unlimited. When a benefice is full, and under sequestration, the surveyor shall inspect "as soon as conveniently may be" after the bishop's direction (ss. 12, 13, 14), because in such cases speed is of no consequence. The difference between this language and that in s. 29 brings out plainly the intention of the Act when a benefice is avoided.

Cave, Q.C., was not heard in reply.

BRAMWELL, B. This is very plain. The limitation of time is not in respect of the surveyor. The words are, "within three calendar months after the avoidance . . . . the bishop shall direct the surveyor *who shall* inspect . . . . and report." If they had been, "and the surveyor shall inspect," &c., there would have been a possibility of suggesting that the three months applied to the surveyor; but even then I doubt if they would.

Besides this—and it is not to be supposed that I say anything to the contrary—there is the question whether the limitation of three months is anything more than directory, even as regards the bishop.

CLEASBY, B. I am of the same opinion. It would be strange if the plaintiff were to lose his right against the late incumbent because the bishop delays directing the surveyor till the three months are nearly expired, so that the surveyor has no time to inspect and report within the three months.

AMPHLETT, B. I am of the same opinion. I am far from saying that if, from accident or necessity, the bishop omitted to direct the surveyor within the three months, the late incumbent's estate would be free.

Judgment for the plaintiff.

Solicitors for plaintiff: *Scott, Jarmain, & Trass, for F. C. Mayer, Burslem.*

Solicitors for defendant: *Bell, Brodrick, & Gray, for Weatherhead & Burr, Keighley.*

[IN THE COURT OF APPEAL.]

1876
Feb. 23.

SWINTON *v.* BAILEY AND OTHERS.

Will made before 1838—*Obliteration of Devise or Clause—Revocation—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 6.

A testator, who died before 1838, by a will duly executed and attested devised realty to his mother, "Elizabeth Eley her heirs and assigns for ever." After execution he drew his pen through the words "Eley her heirs and assigns for ever" and wrote the word "Eley" above the erased words. On the question whether the obliteration cut down the devise from an estate in fee to an estate for life, as being a revocation of a devise or of a clause within s. 6 of the Statute of Frauds:—

Held (reversing the judgment of the Exchequer Division), that there was a revocation of a clause within the statute; and that the mother took an estate for life only.

EJECTMENT. At the trial before Brett J., without a jury, at the Lincolnshire Spring Assizes, 1875, the following facts were agreed to by counsel. The will of Joseph Eley, made in 1826, and attested by three witnesses, contained (inter alia) the following words: "Being desirous in case of my death prior to the decease of my dear mother Elizabeth Eley of making some further provision for her I therefore give and devise unto her my said mother Elizabeth Eley" certain messuages, lands, tenements, and hereditaments (part of which were the subject of this action), "to hold unto my said mother Elizabeth Eley her heirs and assigns for ever." Through the words "Eley her heirs and assigns for ever" a line had been drawn, as if by a pen, and above the erased words was written the word "Eley." This erasure was not noticed in the attestation clause, nor otherwise attested. The testator died in 1836, and the will was proved the same year by his mother, the executrix, who made an affidavit that after the testator's death she found the will with the above erasures. She died in 1859. The plaintiff contended that the words "her heirs and assigns for ever" were to be read as part of the will, so as to give the testator's mother an estate in fee simple; and if this contention were correct, the plaintiff, as heir-at-law of her devisee, would be entitled to the verdict. The defendants contended that the will was to be read without those words, so as to give the

testator's mother an estate for life only; and if this view prevailed, the defendants, who claimed through the testator's heir-at-law, would be entitled to the verdict. Brett, J., entered the verdict for the defendants, reserving leave to the plaintiff to move to enter it for him, the Court to be at liberty to draw inferences of fact.

A rule nisi having been accordingly obtained in the Exchequer Division to enter the verdict for the plaintiff on the ground that there was no proof that the erasures were made by the testator animo revocandi, and that there was no proof that the estate in fee simple was intended to be cut down to a life estate, and was so cut down accordingly, the Court to draw inferences of fact,

Nov. 18, 1875. *Wills, Q.C.*, *Mellor, Q.C.*, and *Dunning*, for the defendants, shewed cause. The obliteration of the words cut down the devise to the mother from an estate in fee to an estate for life: it was a revocation pro tanto of a devise, or at least of a clause thereof, under s. 6 of the Statute of Frauds (29 Car. 2, c. 3) (1): *Larkins* v. *Larkins* (2) and *Short* v. *Smith.* (3) In *Larkins* v. *Larkins* (2) the testator, having devised lands to three trustees, struck out the name of one, and the Court decided directly that the obliteration did not revoke the devise to the three, and were of opinion that it revoked the devise to the obliterated trustee only. A similar opinion was expressed in *Short* v. *Smith* (3), and the present case is undistinguishable in principle. If the testator had said, "I devise the lands to Elizabeth Eley, and I devise the lands to her, her heirs, and assigns for ever," and had

(1) Sect. 6: "No devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing or other writing of the devisor, signed in the presence of three or four witnesses declaring the same; any former law or usage to the contrary notwithstanding."

(2) 3 B. & P. 16 109.

(3) 4 East, 419.

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then struck out the words "I devise the lands to her, her heirs, and assigns for ever," could there be any doubt that it would have been an obliteration of a devise or of a clause within the statute? The only difference between that devise and the present words is one of grammar. [They also referred to 1 Jarm. Wills, 3rd. ed. p. 125; *Humphries* v. *Taylor*, 8 Bac. Abr. ed. 1832, tit. Wills, p. 500; *Ex parte Ilchester* (1); and the notes to *Duppa* v. *Mayo*, 1 Notes to Wms. Saund. p. 424. The original will was shewn to the Court, and the question whether the words were obliterated before or after execution, and whether by the testator or some one else, was discussed, and *Cooper* v. *Bockett* (2) cited, but the Court held that those points were not open to the plaintiff upon this rule.]

Gill (*Waddy, Q.C.*, with him), for the plaintiff, supported the rule.

KELLY, C.B. The rule must be absolute to enter the verdict for the plaintiff. The question appears to me a plain one, depending on the express and unambiguous words of the Statute of Frauds. By his will, made in 1826, and therefore before the Wills Act of 1837 came into operation, the testator devised a messuage and lands to his mother, "Elizabeth Eley her heirs and assigns for ever." The will thus written devised the realty to the mother in fee simple. The question whether the words "Eley her heirs or assigns for ever" were obliterated by the testator himself was not raised at the trial, and is not mentioned in the rule. If it were necessary to decide that, I should be inclined to hold that they were not obliterated by the testator; but I do not rely on that point, I assume that after the execution and attestation, the testator himself obliterated the words "Eley her heirs and assigns for ever" and interlined the word "Eley." The question is whether the obliteration had the effect of revoking that portion of the devise contained in the words "her heirs and assigns for ever," and so converting the estate devised to the mother from an estate in fee to an estate for life. The question depends on the true construction of s. 6 of the Statute of Frauds. I think the obliteration had no such effect, because I think it plain that the words of s. 6 mean

(1) 7 Ves. 348. (2) 4 Moo. P. C. 419.

that to constitute a revocation of a will, devise, or clause there must be an obliteration of one entire and complete will, devise, or clause. This was not an obliteration of a will, devise, or clause, but merely of certain words which mean nothing taken by themselves. [His Lordship read the first half of s. 6.] Now, if the words "her heirs and assigns for ever" stood alone, what effect could they have? None whatever. Then can the words constitute a "devise or clause" within the meaning of s. 6? The question answers itself. The word "revocation," therefore, in reference to such words, is inapplicable and insensible.

But if there could be any doubt as to the intention of the legislature, it would be set at rest by the latter half of s. 6. [His Lordship read it.] That enacts that all devises shall remain in force until the same be obliterated. What is the meaning of the word "same?" Has this devise, "I devise certain lands unto my mother Elizabeth Eley her heirs and assigns for ever," which is one complete devise, been revoked or touched in any way except by the obliteration mentioned? It would be quite a different matter if the statute spoke of an "alteration by obliteration." There is nothing here revoked, though the effect of the devise is entirely altered by the obliteration. I think, therefore, that this case is not within the words or the intention of the legislature.

As to the authorities, only two cases have been cited which have any substantial bearing on the question. In the first, *Larkins* v. *Larkins* (1), the marginal note is "if a testator, having executed a devise of lands, in the presence of three witnesses, to two persons as joint tenants in fee, afterwards strike out the name of one of the devisees, and there be no republication, the erasure will only operate as a revocation of the will pro tanto." There the obliteration operated as a revocation of the estate to one of the trustees, but in that case the words struck out were a complete devise to him, and the obliteration produced the same effect as if he had died, the other trustees taking the whole.

The same remark holds good of *Short* v. *Smith.* (2) The marginal note is "where one devised land to two trustees in trust for certain purposes, by a will duly executed and attested, and he afterwards struck out the name of one of those trustees, and

(1) 3 B. & P. 16. (2) 4 East, 419.

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inserted the names of two others, leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not republish his will: held, that his intent appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the proper requisites of the Statute of Frauds, it should not operate as a revocation; *or at most*, it could only operate as a revocation pro tanto as to the trustee whose name was obliterated, leaving the devise good as to the old trustee whose name was retained."

In this case, as in *Larkins* v. *Larkins* (1), although in form there was but one devise contained in one sentence governed by the same words at the beginning and end, yet in reality there were two devises, each being complete as to each trustee. Therefore, even assuming it to have been indirectly held in *Short* v. *Smith* (2) that the obliteration of the name of one trustee operated as a revocation as to that trustee, yet it was a revocation of a perfect devise, and if so, there was within the statute an obliteration of a devise, and not of a few words in the middle of a devise.

No case has been cited, and I do not believe there is any, which decides that the alteration of words in a devise, so as to convert an estate in fee into an estate for life, is an obliteration of a devise within the statute. To be a revocation within the statute, I think it must be an obliteration of an entire and complete devise or clause, and that the plaintiff is therefore entitled to the verdict.

CLEASBY, B. I am of the same opinion. The striking out of the words "her heirs and assigns for ever" is not, as it seems to me, an obliteration of a devise or clause within the words of s. 6, nor within the intention of the section. If instead of the words "her heirs and assigns for ever," the expression had been "absolutely," or words of the same import, so that what would otherwise be an estate for life was enlarged into an estate in fee, could it be said that the obliteration of the word "absolutely" was an obliteration of a devise or clause? It would be monstrous. But the effect must be the same in the present case.

Then should we be justified in giving a liberal construction to the statute and extending its scope so as to include a qualification

(1) 3 B. & P. 16. (2) 4 East, 419.

of a devise or clause? I think not; because there is a real difference between a clear, definite act revoking a devise or clause, and doing something which perhaps depends on a legal view or legal knowledge. The words obliterated might be thought immaterial, or it might not have been considered what effect the obliteration would have. I think, therefore, there is no reason for going beyond the language of the statute and extending it to a qualification of a devise or clause.

The authorities stand clear of the present case. In both the cases referred to by my Lord there was an obliteration of a devise.

AMPHLETT, B. I am of the same opinion. If the point had been properly made at the trial and were now open, a good deal might be said for the view that the obliteration was not made by the testator; but it must be assumed that it was made by him after the will was executed. It is clear the legislature intended to make a distinction between the revocation of a will, devise, or clause, and any alteration of either. I agree with the Chief Baron that this is not an obliteration of a perfect devise or clause. It is clear that the object of the testator was to alter the devise, to cut it down from an estate in fee to an estate for life.

Larkins v. *Larkins* (1) has been a little misunderstood. There the testator devised lands to three trustees, Larkins, Enderby, and George Smith, their heirs and assigns, upon trust, and obliterated the name of George Smith. It was not there argued that the obliteration of Smith's name was not a revocation as to him. The point was a different one—whether, admitting that the devise to Smith was revoked, the obliteration operated as a revocation of the devise to the other trustees. That was the only question, and it was decided that when Smith's name was struck out, the whole estate was given to the others. The question for the opinion of the Court was "whether the devise of the estate at Calcutta to the trustees named in the said testator's will to be sold, was revoked by the testator's having struck out the name of George Smith, one of such trustees, after the execution of his said will." It was held that it was not a revocation of the devise to the

(1) 3 B. & P. 16, 109.

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trustees, and Chambre, J., referring to the argument that the remaining devisees would take a larger interest, said that that argument did not apply, because the devisees being joint tenants, were seized per my et per tout, and if one joint tenant died in the lifetime of the testator, the other joint tenant took the whole of the estate by force of the original devise. That was a very different case to the present. Here there was no animus revocandi, or rather the intention was to revoke the estate in fee, and give an estate for life, a gift which could not be valid because it was not attested as required by the statute.

Rule absolute.

Feb. 23, 1876. From this judgment the defendants appealed, and during the argument before the Court of Appeal the original will was shewn to the Court, and *Cave, Q.C.*, for the plaintiff, admitted that he could not, for the purposes of the appeal, deny that the obliteration was made by the testator himself, or in his presence, and by his directions and consent.

Wills, Q.C., and *Mellor, Q.C.* (with them *Dunning*), for the defendants, appellants. The object of ss. 5 and 6 of the Statute of Frauds was to secure better evidence of acts done by a testator, by way of revoking or otherwise affecting his will. The modes of revocation existed before, and were not invented by the statute. In s. 6, "nor any clause thereof" means any clause of a devise, and "clause" is not a term of art, but is equivalent to the expression "any part," used in ss. 20 and 22 of the Wills Act, 1837 (7 Wm. 4 & 1 Vict. c. 26). Sir H. Jenner Fust appears to have considered the two statutes as identical in this respect, for in *Goods of Francis Lambert* (1), after the execution of a will, which was made in 1837, the testator cut out parts of one sheet, and Sir H. J. Fust said, "It is immaterial whether it was done before or after the 1st of January, 1838, for under the 20th section of the Act (7 Wm. 4 & 1 Vict. c. 26) a will may be revoked in part as well as in the whole by burning, tearing, or otherwise destroying with intention to revoke. There can be no doubt that the testator intended to

(1) 1 No. Cas. 131.

revoke the part removed, and that it was his own act; the paper is therefore revoked pro tanto, and good for the other parts." Probate was granted without the removed parts. The same judge gave a decision to the same effect in *Goods of Cooke* (1), as to a will made since 1838. To constitute a revocation under s. 6 of the Statute of Frauds, an obliteration must leave the unobliterated part of a devise effective and sensible. Provided it does that it satisfies the section. In the present case the unobliterated words are an effective devise of an estate for life. An estate in fee simple is composed of an estate for life, with remainder by way of limitation to the heirs. If, instead of the existing words the testator had said, "I devise the lands to my mother for life, and after her death I devise the lands to her heirs for ever," that would, by the rule in *Shelley's Case* (2), have given an estate in fee simple to the mother, and if the testator had struck out all the words except "I devise the lands to my mother for life," that would manifestly have been an obliteration of a devise or of a clause within s. 6. There is no substantial difference between such a devise and the present. This argument was rejected as almost unworthy of consideration by the Exchequer Division, who apparently held that "clause" means nothing less than an entire and complete grammatical sentence, with a nominative, a verb, &c., in their proper places.

[COCKBURN, C.J. The Exchequer Division held that the words obliterated were neither a devise nor a "clause," within s. 6. But if so, then the section does not apply at all, and it is unnecessary to consider whether there was a revocation within the meaning of the section.]

Precisely so. But the sounder view is that the obliterated words are a devise or clause within the section; and this is in accordance with *Short* v. *Smith* (3); *Sutton* v. *Sutton* (4); and *Larkins* v. *Larkins* (5), where Serjeant Stephen argued that such an obliteration as the present would not be a good revocation within the statute, but the Court did not say anything to confirm his view. In 1 Jarm. Wills, p. 125 (3rd ed.), Mr. Jarman, in

(1) 5 No. Cas. 390.
(2) 1 Co. Rep. 93.
(3) 4 East, 419.
(4) Cowp. 812.
(5) 3 B. & P. at p. 21.

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reviewing these decisions, says: "If a testator draws a pen over *part of the will* only, a revocation is effected pro tanto, and the unobliterated portions remain in force," shewing that he did not make the distinction since made by the Exchequer Division. If the testator, instead of obliterating, had in a valid codicil directed that the devise in the will to his mother be read without the words "her heirs and assigns for ever," that would clearly have been a good revocation within s. 6. But if the principle of the decision of the Exchequer Division be right, it would not be a good revocation, for s. 6 makes no distinction between revocation by a codicil and by obliteration.

Cave, Q.C., and *Romer*, for the plaintiff, respondent. The object of s. 6 was to prevent ignorant testators from altering their wills except by another properly attested will or codicil. They might be trusted to destroy the whole will, but revocation of clauses is more difficult and dangerous. The key to the section is found in the latter part of it, which enacts that every devise shall stand unless the whole be obliterated. When s. 5 is looked at, it is plain that "any clause thereof," in s. 6, means any clause of the will. Revocation may be by obliteration: but alteration can only be by another properly attested will, and there is no case where an unattested obliteration, which amounted to an alteration, has been held good under s. 6. In *Kirke* v. *Kirke* (1), the testator bequeathed to a legatee "four thousand pounds," and afterwards drew a pen through the word "four," and wrote "three" above it, and afterwards executed an unattested codicil, in which he revoked the gift of 4000*l.* and gave 3000*l.* to the legatee; and it was held that the obliteration and codicil were ineffectual, and that the legatee took 4000*l.* In *Lock* v. *James* (2), Rolfe, B., seemed to think that the obliteration of the words "after her decease" in a will, could not change a postponed into an immediate devise. There is no authority precisely on the present point. *Larkins* v. *Larkins* (3) is the nearest, but there the remaining trustees took exactly the same estate after the obliteration as before. The obliteration in that case had the same operation as if the obliterated trustee had died in the testator's life time; but the present de-

(1) 4 Russ. 435, 452. (2) 11 M. & W. 901, 908.
(3) 3 B. & P. 16, 109.

fendants seek to give the obliteration the same effect as if the words had never been in the will. It is clear the testator could not directly obliterate a devise in fee and interline an estate for life without a proper attestation. Why should it be supposed the legislature intended to allow it to be done indirectly, merely because the devise in fee happens to be expressed in such language that the alteration can be physically effected by obliteration? It is in substance an alteration. It diminishes the gift to the mother, and enlarges the estate which descends to the heir. The words "her heirs and assigns" are not necessary to confer an estate in fee simple. "I give my estate," or "my fee simple," would have the same effect, and there it would be impossible to cut down the fee to a life estate by mere obliteration. Can the accident of phraseology make any difference in the construction of the word "clause," or the interpretation of s. 6? It is argued that, because a codicil directing that the devise to the mother be read without "her heirs and assigns for ever" would be a good revocation, so must an obliteration be, since s. 6 makes no distinction between those two forms of revocation. The answer is that such a codicil would come under the latter part of s. 6, and would be held effective as an alteration, not as a revocation.

Wills, Q.C., in reply. The object of the Statute of Frauds was not to prevent unskilful testators from meddling with their own wills, but to protect Courts, and others who have to deal with wills, from being imposed upon by acts of which there was insufficient evidence. If this obliteration amounts to an alteration, so did that in *Larkins* v. *Larkins* (1), for since the heir of the surviving trustee would take the whole estate, the elimination of one trustee might make all the difference in the ultimate disposition of the property.

COCKBURN, C.J. I think the judgment of the Court of Exchequer must be reversed. It all turns upon the construction of the 6th section of the Statute of Frauds, and that part of the statute which relates to wills.

Now I quite agree that you cannot by merely striking out words alter a will so as to enlarge the estate of some one who takes under

(1) 3 B. & P. 16, 109.

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the will, or so as to have the effect of granting a new estate to some one. But when the purpose is simply to revoke and undo something which has been done, and when the effect of striking out certain words is to revoke what has been given, and no more, it does not seem to me to be brought at all within the mischief contemplated by the Act, or to be inconsistent with the terms of the 6th section. That the testator intended to cut down the estate in fee simple which he had given to his mother to a life estate I cannot, looking at the will, entertain the slightest doubt. It is said that the words erased are not a clause, and that, consequently, the 6th section having enacted that no devise or clause shall be revocable except by certain forms of revocation or by some other will, or codicil, or other writing, this is not a clause to which a power of revocation attaches. If it is not a clause, then the case is not within the section at all. But I do not place my judgment upon that narrow ground. I think this is a clause within the section, because, although it is a devise in fee simple, I think that is (so far as it is matter of revocation) divisible into two parts, and that the man who has given the larger estate may revoke the gift to that extent and cut it down to the smaller gift or devise of an estate for life. And that is all that this testator has done. It may be you cannot add to the will without satisfying the requirements of the second part of the 6th section, but you may by striking out words have the effect of revoking, and without militating against the provisions of that section.

You may have a case in which the phraseology of the will is such that you cannot by striking out words effect your purpose. Then your case falls within those instances which Mr. Romer pointed out in his able argument. But here the words are such that by the expunging a portion of them you have the effect of revoking, seeing that an estate in fee simple may be revoked to the extent of taking away, not all the estate, but that portion of it which is an estate of inheritance. If the phraseology of the will is such that by striking out certain words you revoke the estate in fee simple and leave the estate for life standing, I see no reason why that should not be done. That is what I think the testator intended to do and has done. The view taken of the matter in the Court below was a mistaken one, especially as it was

based on the question of whether this was a "clause" or not. I think for all practical purposes of the application of the statute it is a clause, and is one therefore which might be revoked.

MELLISH, L.J. I am of the same opinion. Looking at the whole of section 6, I think the word "clause" is not used in any strict or technical sense, but that it merely means the same thing and has the same effect as "part;" and—as appears to have been the view of Sir H. Jenner Fust (1) and of Mr. Jarman (2)—that s. 20 in the Wills Act of 1837, which speaks of "no will or codicil, or any part thereof," means the same thing as what is here spoken of as "no devise nor any clause thereof." Section 6 says, "No devise in writing of lands, tenements, or hereditaments, nor any clause thereof"—which, I think, means "any part thereof"—"shall at any time after" such and such a time be revocable otherwise than, &c. What it means, I think, is that revocation may be made in any one of these various ways. Then s. 6 says, "or by burning, cancelling, tearing, or obliterating the same." Now "the same" in that sentence means the will itself, the actual document, the paper which is to be torn, cancelled, burnt, or obliterated, and then it is plain that revocation may be shewn, either of the whole of the will or of a part of the will, by tearing, burning, cancelling, or obliterating, and that is to be applied to the actual paper itself.

Now in construing a will, the testator must have used such language that you are able to discover what his intention is in order to carry it out. So I think that for the purpose of revoking by obliteration, the obliteration must be of such a kind that the Court can plainly see what the intention of the testator was by obliterating. In the present case that presents no difficulty at all, because no one can doubt, and it seems to be assumed, that by striking out the words "her heirs and assigns for ever" the testator's intention was to cut down the estate which he had previously given to his mother from an estate in fee to an estate for life. Therefore the Court can see plainly what he intended. Then the question is, Can it be carried out? That seems to me to depend simply on this: Is it a revocation? Because nothing

(1) 1 No. Cas. 132. (2) 1 Jarm. Wills, 125, 3rd. ed.

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can be done by obliteration except a revocation. There can be no addition. The difference between revocation and alteration seems to me to be this: if it simply takes away what was given before, or a part of what was given before, then it is revocation; but if it gives something in addition, or gives something else, then it is more than revocation, and cannot be done by mere obliteration. Here it simply takes away something that was given before. It makes the estate less than what it was. It does not give the mother anything which she had not before, because she had an estate for life before. The estate in fee included an estate for life. It seems to have been the intention of the legislature, as far as one can judge from the language they have used, that revocation might be accomplished by simple obliteration, without making a new attested will. It appears to me this merely amounts to a simple revocation, because it simply takes away a part of the estate which had been before given.

BAGGALLAY, J.A. I am of the same opinion. Having regard to the language of the 5th and 6th sections of the Statute of Frauds, I assent to the argument which has been addressed to us by Mr. Cave and Mr. Romer, and which appears to have been assented to in the Court of Exchequer, that the words "clause thereof" in the earlier part of the 6th section must mean clause of the will. Then we find the provision is that no will in writing of lands, nor any clause thereof, shall be revocable otherwise than in the manner mentioned in the further part of that clause. But I am unable to assent to the limited construction which has been put on the word "clause" as used in that section. In fact, I am disposed to give it a more extended signification even than may be necessary for the decision of the present case. It appears to me to be used only in the sense of "a part of a will," subject perhaps to this qualification, that the words revoked must be such as to leave the rest of the will intelligible.

The provision is made for two classes of cases, total and partial revocation, and we find words used which are more or less applicable to both classes. We have in the first case a form applicable to both, namely, a revocation by some other will or codicil in writing or other writing declaring the same. Then we have four

other modes of revocation, the first three of which, burning, cancelling, and tearing, would appear to be more applicable to the case of complete revocation, and the fourth, obliterating, might be applicable either to the one or the other. But I cannot see that those four alternative forms are applicable to any other classes of revocation than those which may be effected by will or codicil. Now, if this testator had made a codicil and had said, "I desire that in my will the devise to my mother shall be read as if the words 'her heirs and assigns for ever' were omitted," it cannot be denied that effect could be given to that codicil, and those words could be considered as not included in the will. Then if the same effect can be produced by obliteration only, it appears to me this section expressly provides that it may be done by obliteration, and that is exactly what the testator has done. He has struck out these words by obliteration, and it has produced the same effect as if there had been a codicil executed in writing directing the same thing to be done.

MELLOR, J. I am of the same opinion. I think the judgment of the Court below gives much too narrow a construction to the word "clause." I very much incline to agree with Lord Justice Baggallay, and read it as equivalent to "part of the will;" but, at all events, when you can by obliteration strike out a portion of a will following other words, and yet leave an effective disposition by sensible words remaining, I do not see why that should not be done just in the same sense and in the same way as revocation by some writing. To the extent to which the present obliteration goes it strikes out words which enlarge the estate to the devisee, but it leaves words perfectly consistent, and sensible, and effective which give a life estate. I read the clause, or paragraph, or sentence as manifestly divisible, because you can by the mere obliteration of certain words leave a perfectly effective devise of an interest which is less than that which was before given by the testator. It appears to me, therefore, to come necessarily within the terms used by the statute, and to be a perfectly effective revocation.

GROVE, J. I am of the same opinion. It seems to me that the

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judgment of the Court below and the argument of the plaintiff's counsel do not give sufficient effect to the distinction between the terms "clause" and "devise." The argument would possibly have been sound if "clause" meant the same thing as "devise." As the Act has said "devise" as well as "clause," perhaps "clause" signifies something so far differing from "devise" as to mean any part which can be struck out leaving a remainder which is sensible.

Judgment reversed.

Solicitors for plaintiff: *Speechly & Co.*

Solicitors for defendants: *H. B. Clarke & Son, for Harrison & Smith, Wakefield.*

Feb. 2, 3.

WOOLER AND WIFE *v.* KNOTT.

Landlord and Tenant—Covenant not to do any Act that can or may affect, lessen, or make void Public-house Licences—Forfeiture—Licensing Acts, 1872 *and* 1874 (35 *&* 36 *Vict. c.* 94, *and* 37 *&* 38 *Vict. c.* 49).

By a lease of a publichouse made after the Licensing Act, 1874, came into operation, the lessee covenanted not to "do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the public-house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day two offences against the Licensing Acts of 1872 and 1874, was convicted thereof by justices, who directed, under the Act of 1874, s. 13, that the convictions should not be recorded on any of the defendant's licences. The lessor having brought an action against the lessee to recover possession of the public-house on the ground of forfeiture, and for damages for breach of covenant:—

Held, that the licences were not "affected" within the meaning of the covenant, and that there was no breach of covenant.

Affirmed by Ct of App. 12 Ch D. 265.

DEMURRER to a statement of claim which contained the following allegations (inter alia):—

On the 29th of August, 1874, the female plaintiff, before marriage, by deed let to the defendant a public-house or inn and premises in Middlesborough, in the county of York, for a term of six years from the 13th of May, 1874, at the yearly rent of 50*l.*

By the deed the defendant covenanted with the female plaintiff, her heirs and assigns that she would "keep the public house or inn and premises open as a public house, and that in the usual

and customary way and manner as houses of that description were kept, and *would not do, omit, or permit, or suffer to be done, or omitted, any act, matter, or thing whatsoever that could or might affect, lessen, or make void either or any of the licences for the time being granted to the said public-house or inn and premises.*"

The deed also contained a proviso that in case any breach or default should be made by the defendant in any of the covenants it should be lawful for the female plaintiff, her heirs and assigns, to re-enter and expel the defendant.

On the 26th of September, 1874, the plaintiffs were married.

On the 14th of October, 1875, the defendant kept open the public-house during the prohibited hours. And on the same day she permitted drunkenness and was herself drunk in the public house and she was afterwards, on or about the 18th of October, 1875, duly convicted before the magistrates sitting at Middlesborough, and fined by them in respect of the two former of the said offences.

The plaintiffs claimed possession of the public house and premises; and 1000*l.* damages for the breaches of covenant.

It was agreed between counsel that the case should be argued and decided with this additional fact, that the convicting justices directed as part of their sentence that the convictions should not be recorded on any of the defendant's licences; and that neither of them was so recorded.

Cave, Q.C. (with him *J. C. Heath*), for the defendant. The question is whether the mere fact of two convictions on the same day for offences against the Licensing Acts of 1872 and 1874 amounts to a breach of this covenant and works a forfeiture. The statement of claim in reciting the covenant has put the verb in the past tense: "any act . . . that *could* or *might* affect," &c.; but the words of the covenant really are, "any act, matter, or thing whatsoever that *can* or *may* affect, lessen, or make void," &c. It will not be contended that the defendant's licence has been lessened or avoided, and the only question is whether it is "affected." Permitting drunkenness on the premises is an offence under s. 13 of the Licensing Act, 1872, and keeping the premises open for the sale of intoxicating liquors during prohibited hours is

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now an offence under s. 9 of the Licensing Act of 1874, s. 24 of the Act of 1872 having been repealed. By s. 30 of the Act of 1872, two convictions recorded on the licence, followed by a conviction, make the licence ipso facto void, and disqualify the premises, unless the Court orders otherwise, and s. 31 provides for recording convictions on the register of licences, and imposes further disqualifications on the premises of persons licensed since the passing of the Act of 1872. No amount of convictions can avoid a licence or disqualify premises, unless they are recorded on the licence. By the Act of 1872 certain convictions were to be recorded unless the convicting justices otherwise directed (ss. 13, 24, 55, and 57); but by the Act of 1874, s. 13, the justices, before passing sentence, are required to inspect the register of licences and to declare as part of their sentence whether the conviction shall or shall not be recorded on the licence. The recording on the licence is the test; unless that is directed the licence is untouched and is not "affected" within the meaning of the covenant. Under the Act of 1872 a licence may be reduced from a seven-day to a six-day licence (s. 49); or the hour for closing may be made earlier (s. 7 of the Act of 1874), upon the application of the licensed person. As the Act of 1874 came into operation on the 30th of July, 1874, and this lease was made on the 29th of August, 1874, the framer of the covenant probably intended "lessen" to refer to these provisions. This view gives a definite meaning to each word "affect, lessen, or make void." "Affect" cannot mean induce the justices not to renew the licence; for that being a matter entirely within their discretion, an indefinite number of acts might amount to a breach of covenant. Nor can a mere offence against the Act without a conviction be said to "affect" the licence; for the parties cannot have intended that a forfeiture should depend on the verdict of a jury upon so indefinite a question as that of drunkenness. In construing covenants the Court will always lean against forfeitures.

Morgan Lloyd, Q.C. (*Willis* with him), for the plaintiffs. The rule as to forfeitures is laid down in *Goodtitle* v. *Saville*. (1) The question cannot depend on whether the justices require the conviction to be recorded on the licence; their exercise of

(1) 16 East, at pp. 95, 97.

discretion cannot affect a vested cause of action. Whether a conviction is recorded on the licence or not, it must, under s. 36 of the Act of 1872, be recorded on the register of licences, and so it affects the premises. The landlord desires protection from acts which may result in a loss of the licence, and this view gives a meaning to the words "may or can." The defendant reads the covenant as if it were "any act which shall have affected, &c.," and gives no meaning whatever to "can." A conviction for an offence against the statutes is a definite act, as to which there can be no doubt, and in the natural meaning of the words would be said to "affect" a licence. Sect. 56 of the Act of 1872 shews that it is the conviction, not the record on the licence, which disqualifies the premises, for it provides that where any tenant of licensed premises is convicted of an offence against the Act, "and such offence is one the repetition of which may render the premises liable to be disqualified,"—nothing being said about recording the conviction,—the owner of the premises shall be served with notice of the conviction. An offence against the Acts would "affect" the licence; but it is enough for the present case to hold that two convictions at all events do.

Cave, Q.C., was not heard in reply.

[During the argument the Court inquired how many licences were held by the defendant, but the counsel were not able to give the number.]

KELLY, C.B. I think the defendant is entitled to judgment, and that no forfeiture has been committed. The object of the landlord is that the licence shall be kept intact, and that it shall not be ultimately avoided. Now the state of the law is this: A licensed tenant may commit an offence against the Act or even two offences; nay, he may be convicted of two offences, but unless those convictions are recorded on the licence, and also followed by a third conviction, the licence is not avoided. The justices have power to do an act by which the licence may be affected; they may declare that the conviction shall be indorsed on the licence, but unless that is done the licence is absolutely unaffected. In a sense the licence may be said to be affected if a conviction is indorsed on it, but unless that is followed by

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certain substantial acts the licence is not avoided; and the question is whether anything short of those acts—whether anything which only renders it more probable that the licence will be avoided, can be said to affect the licence and to work a forfeiture.

In considering this question I do not follow the rule which Lord Ellenborough expressed about forfeitures in *Goodtitle* v. *Saville*. (1) In order to work a forfeiture of property the covenant should in my judgment be expressed in language so clear that no doubt can be left on the mind of the judge who has to decide the question that the contracting parties understood and intended that the act should work a forfeiture. It was contended that any act which amounts to an offence against the statute would be a breach of the covenant and work a forfeiture, even before it is known whether there will be a conviction for the offence. If that were so, the jury would have to determine a question which would be in many instances of most indefinite extent, viz. whether the offence had been actually committed. And see what an absurd result would follow. The Act directs that it shall be an offence to keep a public-house open after a certain hour. Some one accidentally injured is brought in; he is believed to be dying; and while he is being attended to the hour for closing strikes. If the tenant keeps open his house for the purpose of administering stimulants and necessaries, or if from any other unavoidable accident he is prevented from closing at the right moment, an offence against the Act is committed. But in such a case no one would dream of prosecuting. Is it possible to suppose that such an offence could be intended by the parties to create a forfeiture—or even a conviction for such an offence, seeing that the justices, if they think it would have a severe and unjust operation on the licence, may declare that the conviction shall not be indorsed on the licence? If such an act did work a forfeiture a landlord's property would indeed be valuable to him if the act was committed just after a lease had been granted, and the tenant had entered, and perhaps spent a great deal of money on the premises.

If it had been the intention of the parties that the tenant should run such a risk, nothing could have been easier than to say

(1) 16 East, at p. 95.

in a few words that an act of this sort should work a forfeiture, whatever might be the value of the lease or the consequences to the tenant. But since they have not said so the mere fact that circumstances have happened which, if followed by others, may avoid the licence does not, in my opinion, work a forfeiture. When there is something which directly operates on the licence, which touches it, then only can the licence be said to be "affected." A licence on which there is no indorsement is just as operative for all purposes as if there had been no offence or conviction, and is therefore not "affected." As to the word "lessen," it has been argued that the framer of the covenant had in his mind the clauses of the statutes which speak of reducing a licence, but I confess I do not know what the parties intended by that word.

Seeing that the words of this covenant are not, in my judgment, clear and intelligible, I think they ought not to be held to work a forfeiture; and that the licence, being just as good and valid as when it was first granted, has not been "affected."

HUDDLESTON, B. [after stating the facts which appeared upon the statement of claim]. To enable the matter to be determined on the real facts, Mr. Lloyd very properly admitted that these convictions were not accompanied by what is in the discretion of the magistrates to order, viz. the indorsement of the convictions upon the licence. Now what is the meaning of this covenant, a breach of which creates a forfeiture? In *Goodtitle* v. *Saville* (1) Lord Ellenborough said, "In the construction of covenants of this sort, they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction upon them according to the apparent intention of the contracting parties." And Le Blanc, J., said, "The Court must be thoroughly satisfied of the construction of the lease contended for, as establishing such forfeiture, before they give an opinion which is to destroy the lease." In construing the present covenant, I have arrived at a conclusion not without difficulty, but I have adopted Lord Ellenborough's doctrine, and I endeavour to read the covenant without favour or disfavour, but according to the intention of the parties; and remembering the rule that a cove-

(1) 16 East, at p. 95.

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nant must be construed most strongly against the party who stipulates. (1)

In support of the limited interpretation which Mr. Cave gave to the words of the covenant, "affect, lessen, or make void," he argued that the framer of the covenant while drawing it had in his mind the distinction introduced by the Licensing Act of 1874, and pointed out that the Act became law in July, 1874, and that this covenant was entered into in the following August. That would imply extraordinary diligence in the draftsman, and I cannot place much reliance on that point.

My Lord has referred during the argument to my experience as a Member of the House of Commons during the debates which preceded the passing of the Act of 1874. I do not think I can import that experience into the Act for the purpose of interpreting it, but as a matter of history it may be useful to remember that before the recent Acts there were always two licences (and sometimes more), one from the magistrates and one from the excise, and the framer of the covenant probably had that state of things in his mind when he wrote "either or any of the licences." I think that the words "affect" and "lessen" are to be read in their ordinary English meaning. Whether they are equivalent to "interfere with" or "diminish in value," or what the acts are which would be within their scope, I express no opinion. But no doubt the licence itself—that is, the document—is not affected unless there be indorsed upon it a record of the conviction. The Act of 1872 (35 & 36 Vict. c. 94), required certain convictions to be recorded on the licence, unless the convicting magistrate or justices should otherwise direct, and by s. 36 also required all convictions of licences to be entered on the register. It was said that this often produced an effect not intended, because the clerk was bound to record a conviction on the licence, though the justices might not have intended it. This was thought to be undesirable, and accordingly the Act of 1874, s. 13 enacts that the Court, before passing sentence upon a conviction, shall take into consideration not only the particular offence in question, but previously recorded offences. The Court is to inspect the entries in the register relat-

(1) Broom's Maxims, 3rd Edit., citing *Webb* v. *Plummer*, 2 B. & Ald. 751, per Holroyd, J.

ing to the licence of the offender, and to do one of two things—to declare as part of its sentence, whether it will or will not cause the conviction to be recorded on the licence. This burden is thrown on the Court. I think this throws light on the words of the covenant, "may affect." Mr. Lloyd says, "may affect" means any act which, if followed by other steps, will affect the licence,—the first of a series of steps; but I think the fair construction is this: if the justices, with all the circumstances before them, choose that the conviction shall not be recorded on the licence, then the licence is not affected; if they choose it to be recorded, then the licence is substantially affected. That construction gives a natural sense to the words, and may be fairly supposed to have been intended by the parties, and I think it is the right construction.

Mr. Lloyd, in contending for the harsh construction which he puts upon the covenant, drew an argument from s. 56 of the Act of 1872, which enacts that where a tenant is convicted of an offence "the repetition of which may render the premises liable to be disqualified," the justices' clerk shall serve notice of the conviction upon the owner of the premises. It is apparent from the marginal note, that the object of the section was to protect the owners, and notice is required to be given not only to such owners as brewers, but also to persons interested as mortgagees or otherwise. Mr. Lloyd argued that it was manifest from the phrase "repetition" of the offence, the legislature thought the owner would be affected by the mere conviction, without indorsement; but I do not think this ought to alter our opinion of the meaning of the covenant.

It is not without considerable doubt that I have arrived at this conclusion.

Judgment for the defendant.

Solicitor for plaintiffs: *O. B. Wooler.*

Solicitors for defendant: *Iliffe & Co., for Barron, Darlington.*

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Jan. 25; *Feb.* 8, 29.

Judicature Act, 1873, *ss.* 31, 34, 36, 39—*Judicature Act*, 1875, *s.* 11, *subs.* 2—*Order LI., Rule* 2—*Order LIV., Rule* 2—*Jurisdiction of a Judge at Chambers*—11 *Geo.* 4 *& 1 Wm.* 4, *c.* 70, *s.* 4—1 *& 2 Vict. c.* 45, *s.* 1—*Transfer of Actions*—*Jurisdiction of Judge of one Division to transfer Actions assigned to another Division*—*Counter-claim for Specific Performance of Contract for Lease.*

The effect of ss. 31, 39 of the Judicature Act, 1873, and s. 11, subs. 2, of the Judicature Act, 1875, taken together with Order LI., Rule 2, and Order LIV., Rule 2, is that any judge of the Queen's Bench, Common Pleas, or Exchequer Division, sitting at chambers, has jurisdiction to order that an action assigned to one of those Divisions be transferred to the Chancery Division, though he is not a judge of the Division to which the action is assigned.

To an action in the Exchequer Division to recover possession of land, the defendant set up a counter-claim for specific performance of a contract for a lease. Upon a summons taken out in that Division by the defendant, and against the plaintiff's will, a judge of the Common Pleas Division at Chambers made an order to transfer the action to the Chancery Division, the Lord Chancellor's consent having been obtained:—

Held, that, since it appeared on the facts that there was a primâ facie case for specific performance, which, under the practice before the Judicature Acts, would have entitled the present defendant on a bill for specific performance to an injunction to restrain the action, and since the question of specific performance could be more conveniently disposed of in the Chancery Division, the action ought to be transferred.

Quære, whether the defendant was entitled to the transfer upon merely setting up the counter-claim, and without verifying it.

Held, also (by Amphlett and Huddleston, BB., Kelly, C.B., dubitante), that the learned judge, though not a judge of the Exchequer Division, had jurisdiction, under the Judicature Acts and Rules of Court, 1875, to make the order for transfer.

Held, also (by Huddleston, B.), that the learned judge had jurisdiction under 11 Geo. 4 & 1 Wm. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 1, taken together with the Judicature Acts and Rules of Court, 1875.

THE writ was issued in the Exchequer Division in December, 1875.

The statement of claim alleged that the action was brought to recover possession of land and buildings in Norfolk, of which the plaintiffs were trustees and mortgagees in possession; that the plaintiffs had in September, 1875, entered into negotiations with the defendant for a lease of the premises to him; that the defendant by false representations, and against the plaintiffs' will,

obtained possession of the premises and refused to quit on request.

The statement of defence alleged that an agreement had been come to between the plaintiffs and defendant for a lease on certain settled terms, which agreement and terms were recognized in writing under the hand of one of the plaintiffs acting for both; that the defendant entered the premises upon the footing of the agreement, being let into possession by the plaintiffs' authorized agent, and not by the representations or in the mode alleged by the plaintiffs. By way of counter-claim the defendant claimed to have the agreement specifically performed, and to have a lease granted to him accordingly, and for this purpose to have the action transferred to the Chancery Division.

A summons to transfer having been granted by Huddleston, B., was heard at chambers on the 19th of January, before Lindley, J., who, after hearing the parties and reading the consent of the Lord Chancellor as President of the Chancery Division, made an order to transfer the cause to the Chancery Division (Master of the Rolls).

Upon the argument of the present motion, an affidavit of the plaintiffs and a correspondence between the parties relating to the proposed lease were discussed and shewn to the Court. The plaintiffs had not delivered any reply in the action.

Jan. 25 and Feb. 8. *McClymont*, for the plaintiffs, moved to rescind the order of Lindley, J. There are three objections to the order:—First, Lindley, J., not being a judge of the Exchequer Division, had no jurisdiction to make the order. Sect. 36 of the Judicature Act of 1873 enacts that any cause may be transferred "by such authority and in such manner as Rules of Court may direct." Sect. 11 of the Act of 1875 enacts that, "subject to any Rules of Court" and to the Acts and the power of transfer, a plaintiff may assign his action to any Division he thinks fit: provided that (subs. 2), if he assigns it to any Division to which it ought not to be assigned, "the Court, *or any judge of such Division*," may direct a transfer to the division to which it ought to have been assigned. The Rules of Court referred to in these sections, confine the power of transfer to "the Court or *any judge of the Division to*

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which the action is assigned": Order LI., Rule 2. These limiting words must have been inserted for some purpose. Elsewhere throughout the Acts and Rules, powers are conferred upon "the Court or a judge" generally, without limitation. The reason for the restriction here is that no Division should be deprived of its business against its own will. It is true a general power of transfer is conferred upon the Lord Chancellor by Order LI., Rule 1, but subject to the consent of the President of the Division from which, as well as of the President of the Division to which, the transfer is made. Rule 2 recognizes only the consent of the President of the Division to which the transfer is made. Thus, under neither rule can a division lose its actions without the consent of one of its own judges or its President. The general power given by s. 39 of the Act of 1873 to any judge to exercise all the jurisdiction of the High Court, is conferred "subject to any Rules of Court," and does not therefore enlarge the limited power conferred by Order LI., Rule 2. Nowhere in the Acts or Rules is a power conferred upon a judge of one Division to transfer an action from another Division. Secondly, A plaintiff has a right to assign his action to any Division he thinks fit (s. 11 of the Act of 1875), and this right ought not to be fettered because a defendant thinks the trial will be conducted better in another Division: *Cannot* v. *Morgan.* (1) The Queen's Bench, Common Pleas, or Exchequer can try a question of specific performance of a contract for a lease quite as well as the Chancery Division, and a counter-claim for specific performance is by itself no ground for transfer. By Order XIX., Rule 3, and Order XXII., Rule 9, an order to exclude a counter-claim may be made if the Court or a Judge thinks that it cannot be conveniently disposed of in the action, or ought not to be allowed. Perhaps the plaintiffs may succeed in obtaining such an order, and if so the action will have to be transferred back to this Division, and great delay and expense will have been incurred to no purpose. Thirdly, Assuming that if the defendant had established a good case for specific performance he would be entitled to the transfer, he has not done so here, and it is not sufficient merely to set up the counter-claim, for if so a defendant may always delay, and perhaps

(1) 1 Ch. D. 1.

ultimately defeat, the plaintiff's rights. Lindley, J., ought not to have made the order without being satisfied that the defendant had a primâ facie case for specific performance. The correspondence and affidavits shew that he has no case at all, and that he knew he entered improperly; and that the plaintiffs had always refused to grant a lease on the terms asked by the defendant.

Horton Smith, for the defendant, opposed the motion, and argued that the correspondence shewed he had a clear case for a specific performance. Upon the question of transfer, he contended that the present case was exactly provided for by Form 24 in Appendix C to the Rules of Court, 1875, by which it was apparently intended that a defendant, upon merely setting up such a counterclaim as the present, and without affidavits or verification of any kind should be entitled as a matter of right to the transfer. Upon the question of jurisdiction he referred to s. 21 of the Act of 1875, and the note at the head of the Rules of Court, 1875, which enacts that "where no other provision is made by the Act, or these rules, the present procedure and practice remain in force." The rest of his arguments and authorities sufficiently appear from the judgments.

McClymont replied.

Cur. adv. vult.

Feb. 29. The following judgments were delivered: that of Kelly, C.B., and Amphlett, B., was read by

AMPHLETT, B. This was a motion to rescind an order made by Mr. Justice Lindley in chambers, for transferring this action from the Exchequer Division to the Chancery Division: and two objections were made to that order: one, that Mr. Justice Lindley had no jurisdiction; and the other, that the facts did not justify the transfer. I will first consider the objection to the jurisdiction.

The authority to transfer actions from one division to another is given by s. 36 of the Judicature Act, 1873, but subject to the Rules, and by Order LI., Rule 2, which is the rule applicable to the present case, the order for transfer is to be made "by the Court or any judge of the Division to which the action is assigned," and it is objected that Mr. Justice Lindley, not being a judge of the

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Exchequer Division, had no jurisdiction to make the order. I am of opinion, however, that there are two sufficient answers to this objection:—First, By s. 31 of the Act of 1873, any judge may sit for any other judge of a different Division from his own; and by necessary inference from Order LIV., Rule 2—which excepts the transfer of actions from one Division to another from the jurisdiction of the Masters—it appears that orders for transfer may be made by a judge in chambers, and in my opinion such judge, in making the order, ought to be considered to be acting therein as a judge of the Division to which the action belonged. This is conformable to the practice which has existed for many years in chambers, and any change in that respect would be attended with great inconvenience.

But, secondly, I think that s. 39 of the Act of 1873 expressly confers upon the judge in chambers such power, for it is thereby enacted that "any judge of the High Court may, subject to any Rules of Court, exercise in Court, or in chambers, all or any part of the jurisdiction by this Act vested in the said High Court in all such causes or matters, and in all such proceedings in any causes or matters as before the passing of this Act might have been heard in Court or in chambers, respectively, by a single judge of *any of the Courts* whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any Rules of Court to be hereafter made." I think that, reading this section and Order LI., Rule 2, together, the jurisdiction given by the order to a single judge of the Division to which the action is assigned may be exercised in chambers by any judge of the High Court who may happen to be sitting there. In my opinion, therefore, the objection to the jurisdiction of Mr. Justice Lindley to order the transfer fails.

As to the propriety of the transfer in this case, I think it perfectly clear that the order was right. The claim is simply an ejectment to recover possession of premises upon which the defendant is alleged to have improperly entered. The counterclaim does not allege any legal title in the defendant, but sets up an agreement for a lease from the plaintiffs to himself, and asks for a specific performance. Now, the specific performance of contracts, including contracts for leases, is one of the actions specially

assigned to the Chancery Division (1); and if it had been otherwise, from the machinery at the disposal of that Division, such actions would be more conveniently disposed of there. The plaintiff would, of course, recover in the action of ejectment, as he has the legal title. No trial is therefore wanted in that respect. If after the transfer to the Chancery Division, the defendant makes out his title to specific performance, the plaintiffs will be ordered to grant the lease. If, on the contrary, the defendant fails, he will be ordered to give up possession to the plaintiffs, with such compensation as the circumstances of the case may require.

A complaint was made that Mr. Justice Lindley did not require the defendant to verify the truth of his claim, but the fact was, he was never asked to do so, and it was not, as I understand, contended before him that there was no question of specific performance to try. The existence of such a question was all that was necessary to authorize the transfer. However, that defect, if it was one, was cured before us by the production of the correspondence between the parties and an affidavit of the plaintiffs, which establish beyond all possible doubt that there is a very serious question to try, and one which would, under the old practice, have entitled the defendant on a bill for specific performance to an injunction to restrain the action of ejectment. I have looked at the cases handed in by the plaintiffs' counsel since the argument, but they all go to the merits, with which we have now nothing to do, but which will be determined hereafter at the hearing. The motion, therefore, must be refused, and with costs.

I am authorized to say that the Lord Chief Baron concurs in this judgment, so far as respects the propriety of the transfer on the facts; but he entertains some doubt on the question of jurisdiction, though not sufficient to induce him to dissent from the opinion in this respect of my Brother Huddleston and myself.

HUDDLESTON, B. I am of the same opinion. At chambers I have been often urged to transfer actions from the Common Law Divisions to the Chancery Division, when it has been alleged that questions might be raised involving principles of Equity or the law of real property, but I have invariably refused, because I take

(1) Sect. 34 of the Judicature Act, 1873.

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it that we are bound to deal with all such questions, and there is no reason why we should not. But where, as pointed out by my Brother Amphlett in the course of the argument and in his judgment, the machinery at the disposal of the Chancery Division enables that Division more conveniently to deal with certain actions, there I think we ought to transfer them.

Then it only remains to consider whether a judge of the Common Pleas Division sitting at chambers has power to transfer an action in the Exchequer Division to the Chancery Division. The summons having been, in the first instance, obtained in my name, my Brother Lindley directed the transfer. The Judicature Act, 1875, s. 11, subs. 2, provides that if any plaintiff assigns his cause to any Division to which, according to the Rules of Court, or the Acts of 1873 or 1875, it ought not to be assigned, "the Court or any judge of such Division" may direct the cause to be transferred to the Division to which it ought to have been assigned; and by s. 34 of the Judicature Act, 1873, "there shall be assigned (subject as aforesaid) to the Chancery Division of the said Court . . . (subs. 3) all causes and matters for any of the following purposes": viz. among others for "the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases." Then Order LI., Rule 2, provides how the transfer of an action from one Division to another may be made, viz., "by an order made by the Court or any judge of the Division to which the action is assigned." If that rule is read strictly the power of transfer is confined in this case to the Exchequer Division or one of the Barons.

Then can a judge of any other Division make an order for the transfer? Order LIV., Rule 2, obviously intended that an order of this description should be made by a judge at chambers, for it mentions the removal of actions from one division to another as one of the excepted matters which a master has no jurisdiction to transact. Sect. 39 of the Judicature Act, 1873, prescribes what power a judge sitting at chambers shall have. It is argued that this section does not give a judge of one Division power to transfer an action from another Division, because the power is given "subject to any rules of Court," and by Order LI., Rule 2, the power of transfer is restricted "to the Court or any judge of the Division to

which the action is assigned;" but I agree with the interpretation which my Brother Amphlett puts upon s. 39, and for the reasons he has given.

But, independently of this, I think that by the joint effect of 11 Geo. 4 & 1 Wm. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 1, every judge of the Courts of Queen's Bench, Common Pleas and Exchequer sitting at chambers has power to deal with any matter which, by statute or otherwise, may be dealt with by a judge of any of those Courts in particular. By the earlier of those statutes every judge of those Courts is "authorized to transact such business at chambers or elsewhere depending in any of the said Courts as relates to matters over which the said Courts have a common jurisdiction, and as may, according to the course and practice of the Court, be transacted by a single judge." The second of those statutes, after reciting the above enactment, extends the authority to matters over which those Courts have not a common jurisdiction.

There have been two decisions upon those statutes. In the first, *Palmer* v. *Justice Assurance Society* (1), the question arose under 7 & 8 Vict. c. 110, s. 68, which enacts that upon judgment in certain actions "execution may be issued by leave of the Court or of a judge of the Court in which such judgment shall have been obtained." The Court of Queen's Bench held that Baron Bramwell had power to grant the leave, though not a judge of the Court of Queen's Bench in which the judgment had been obtained; and during the argument Lord Campbell said: "I have myself, when I have been judge in town during the Long Vacation, always acted on the supposition that I had all the authority of a judge of every Court to make orders in any Court."

It was urged upon us that, as the two statutes of 11 Geo. 4 & 1 Wm. 4, c. 70 and 1 & 2 Vict. 45, were passed long prior to the Judicature Acts, their provisions could not apply to the Judicature Acts; but those two statutes were also long prior to 7 & 8 Vict. c. 110, and yet it was held in the above case that their provisions applied to it.

The second decision was in *Owens* v. *Woosman* (2), where it was held that under 30 & 31 Vict. c. 142, s. 10—which enacts that in

(1) 6 E. & B. 1015, 1018; 26 L. J. (Q.B.) 73. (2) Law Rep. 3 Q. B. 469.

3 Jur. N.S. 44

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certain actions "a judge of the Court in which the action is brought shall have power to make an order" to remit the cause to a county court—Willes, J., at chambers had power to make the order, though not a judge of the Queen's Bench in which the action was brought. In delivering judgment Cockburn, C.J., there said—and his reasoning equally applies to the present case—"I think we must assume the legislature to have made this enactment with the knowledge of the previous statutes of 11 Geo. 4 & 1 Wm. 4, c. 70, and 1 & 2 Vict. c. 45; and it would be extremely inconvenient to put the narrow construction on the section contended for on behalf of the plaintiff." Blackburn, J., said: "An order in a cause is and was always made in the court in which the action is brought. Formerly it must have been made by a judge of the particular court, but by two statutes a judge of any of the Superior Courts may act as the judge of either of the other Courts; and the legislature must be taken to have meant by 'a judge of the Court in which the action is brought' a judge sitting at chambers and acting for that Court. No doubt the language is more precise and not so general as in other sections, and if any conceivable object could be shewn to be gained by confining the jurisdiction to a judge of *the* Court and no other, we might be induced to put the narrower construction on the section. But as the legislature use language which has been held not to convey the narrow meaning, and if they had intended it might have used different language, I think, especially after the new arrangement for one judge to act for all the Courts, there cannot be the slightest doubt that the larger interpretation must prevail."

I think, therefore, that in the present case, my Brother Lindley had power, under s. 39 of the Judicature Act, 1873, to make the order for transfer, but, at all events, that he had it under 11 Geo. 4 & 1 Wm. 4, c. 70, and 1 & 2 Vict. c. 45, s. 1. The motion must, therefore, be refused with costs.

Motion refused.

Solicitors for plaintiffs: *Morten & Cutler.*
Solicitor for defendant: *W. C. Russell.*

[IN THE COURT OF APPEAL.]

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Feb. 1.

GAMBLES AND OTHERS *v.* THE OCEAN MARINE INSURANCE COMPANY OF BOMBAY.

Ship and Shipping—Marine Insurance—Voyage Policy and Time Policy combined—Insurance on Ship "to Port, and for fifteen days whilst there after arrival"—Termination of Risk—Deviation.

A ship insured "at and from the port of Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle on the 4th of December, and on the 13th completed the discharge of her inward cargo within the port of Newcastle. Having been chartered to load in the river Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as a stiffening, the ship was moved on the 15th of December to a loading place on the Tyne, within the port of Newcastle, there to complete her loading. Whilst moored there, she was, on the 16th, injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. The policy did not contain the usual twenty-four hours' clause:—

Held, reversing the judgment of the Exchequer Division, that the policy must be construed as a voyage policy with a time policy engrafted upon it, and that although the voyage was terminated, and the inward cargo discharged, the underwriters were liable.

APPEAL from a judgment of the Exchequer Division in favour of the defendants upon a special case, reported ante, p. 8, where the facts are stated. (1)

Herschell, Q.C. (*Rolland* with him), for the plaintiffs, appellants. The mistake of the majority of the Court below is in reading this as a voyage policy only, instead of a voyage and a time policy combined. The fifteen days are separate from and begin at the end of the voyage, just as the thirty days were held to run from the expiration of the usual twenty-four hours in *Mercantile Marine Insurance Co.* v. *Titherington*. (2) In *Haughton* v. *Empire Marine Insurance Co.* (3), which is rather the converse of the present case, a ship insured in a homeward policy, "at and from Havana to Greenock," was injured after she had safely arrived within the harbour of Havana, but before she was safely moored. Held that

(1) On p. 9, in the fifth line from the top, instead of "on that day the ship was chartered," &c., read "on the 8th of December," &c.

(2) 5 B. & S. 765; 34 L. J. (Q.B.) 11. 11 Jur. N.S. 62

(3) Law Rep. 1 Ex. 206.

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the homeward policy had attached, although the risk under an outward policy to Havana might not have terminated. In 1 Phillips on Insurance, 5th ed., s. 950, reference is made to *Stuart* v. *Columbian Insurance Co.* (1), where it was held that a time policy began at the expiration of a voyage policy from Georgetown to Madeira, and covered a subsequent voyage to Brazil.

Cohen, Q.C. (*J. H. Crawford* with him), for the defendants, respondents. The words "and for fifteen days whilst there after arrival" must be construed with reference only to the voyage to Newcastle, just as in *Company of African Merchants* v. *British and Foreign Marine Insurance Co.* (2), where a ship was insured at and from Liverpool to the Coast of Africa "during her stay and trade there," and back to a port of call or discharge in the United Kingdom, it was held that "stay" must be read with reference to "trade," and that the ship having stayed on the coast of Africa for a purpose unconnected with trade, there was a deviation. The present policy does not contain the usual clause, "until she hath moored at anchor twenty-four hours in good safety," nor any clause as to the termination of the adventure on ship, except the clause as to the fifteen days. The printed part of the policy appears to be one adapted for "goods" only, and to have been used for "ship" by mistake for the usual form. Now if the policy had contained the usual twenty-four hours clause and had not contained the clause about the fifteen days, it is clear that if the ship had during the twenty-four hours done anything unconnected with the voyage it would have been a deviation. Logically the same reasoning must hold good of the fifteen days' clause, which is merely a substitution for the twenty-four hours clause. Under the present policy the ship was at liberty to discharge her cargo at different times during the fifteen days, and might change her moorings for that or any other purpose connected with the voyage to Newcastle. But when once that voyage was ended, and the cargo discharged, anything done for a purpose unconnected with the voyage was a deviation. To make a deviation, it is not necessary that the risk be increased, it is sufficient that it be changed. *Mercantile Marine Insurance Co.* v. *Titherington* (3) is a decision not that such a policy must be

(1) 2 Cranch. Circ. Rep. 442. (2) Law Rep. 8 Ex. 154.
(3) 5 B. & S. 765; 34 L. J. (Q.B.) 11.

construed as a time policy together with a voyage policy, but merely that the thirty days must be reckoned in addition to and not inclusive of the twenty-four hours. No question of deviation was raised there.

Herschell, Q.C., replied.

LORD CAIRNS, L.C. In this case there is a policy of insurance upon a ship "at and from the port of Pomaron to Newcastle-on-Tyne and for fifteen days whilst there after arrival." The ship arrived at Newcastle, and, having unloaded her cargo, took in, with reference to a new voyage on which she was chartered, some stiffening, moved to another part of the port, and was there lost inside the port within the fifteen days. The question is, whether the underwriters are liable.

Now, according to the natural construction of the words the ship was clearly lost whilst at the port of Newcastle within the fifteen days; and therefore during the period covered by the insurance, and under circumstances which the words of the policy are apposite to describe. But the ground on which the majority in the Court below proceeded, as I understand, is this—they say this is a voyage policy, and therefore everything in the policy must be construed so that the risk may be considered to cover all that is done with reference to the voyage and nothing more, and therefore the fifteen days must be construed with reference to the voyage; and if during those fifteen days the ship was doing anything with reference to the voyage, then the underwriters are liable, otherwise not. Now, it appears to me, speaking with great respect to the majority of the learned judges in the Court of Exchequer that that is really assuming the whole question in the case.

The question appears to me to be this, is this purely a voyage policy? Undoubtedly, so far as regards the transit of the ship from Pomaron to Newcastle-on-Tyne, it is a voyage policy, and I will assume that as regards the conduct of the ship during that period it is to be judged of as the conduct of any ship subject to a voyage policy ought to be judged of. But then it appears to me that unless these words "for fifteen days whilst there"—that is, at Newcastle—"after arrival," have obtained some peculiar mercan-

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tile meaning by usage or otherwise (which is not contended), there arises after the voyage is completed an addition to, an excrescence upon, the voyage policy in the shape of a stipulation which carries the persons interested in the ship safely over a further period of fifteen days, and that as to that it is not a voyage policy, but a time policy. There is therefore a stipulation for a voyage, and engrafted upon that a further period of fifteen days during which the loss of the ship is insured against.

No authority for the view taken by the majority of the Court below has been cited, except upon the hypothesis that this throughout is to be looked at as a voyage policy. Unless that hypothesis is conceded, the authorities to which the Chief Baron referred are not applicable, and I think that hypothesis cannot be conceded.

The case of *The Mercantile Marine Insurance Co.* v. *Tithering-ton* (1)—where the ship was insured "at and from Liverpool to any port or ports in the North and South Pacific Oceans, and during thirty days stay in her last port of discharge," with a clause that the insurance should continue until "she hath moored at anchor twenty-four hours in good safety"—is much more applicable to the present case than the other authorities, because there the voyage was treated as one separate thing to this extent, that the twenty-four hours, the usual time, was added after the arrival of the ship to make the termination of her voyage, and then upon that was engrafted the stipulation for her safety for thirty days. Surely in that case the two things must be treated as being separate, and I think that is so here. The appellants are therefore entitled to recover.

LORD COLERIDGE, C.J. I am of the same opinion. I was impressed at first with the cited case (2), where the words were "during her stay and trade there," and with Mr. Cohen's argument that the construction which was put upon those words must be applied to the clause in the present policy about the fifteen days, but upon consideration that really does assume the

(1) 5 B. & S. 765; 34 L. J. (Q.B.) 11.

(2) *Company of African Merchants* v. *British and Foreign Marine Insurance Co.*, Law Rep. 8 Ex. 154.

question in issue, namely, whether this is a voyage policy or a time policy. If it were a voyage policy only, the judgment of the majority of the Court below would be right, but that is the point which we have to consider.

Another point which struck me in favour of Mr. Cohen's contention was, that the policy is silent as to any time after the vessel is safely moored, and therefore that there might be some foundation for the contention that the fifteen days is merely a substitution for the ordinary twenty-four hours, and that if so, the longer period is to be judged of by the same principles that apply to the shorter. But, upon consideration, I do not think that is the true view of the policy. We must give the ordinary meaning to words, unless it is shewn that there is some usage which has deprived those words of their ordinary sense. Here the words are that the insurance is to last "for fifteen days whilst there after arrival." What happened was within the fifteen days, and whilst the ship was there, as is found in the case, within the meaning of the policy. Therefore, as it appears to me, the risk was covered by the policy, the judgment of Baron Cleasby was right, and the judgment of the majority of the Court should be reversed.

MELLISH, L.J. I am of the same opinion. I think there is no reason, or no sufficient reason, for departing from the plain meaning of these words. If the words had been simply "for fifteen days after arrival," then it might have been necessary to put some limitation upon them, because the underwriters could hardly have intended to be liable for a ship going out to sea within that time; but the express terms "whilst there," shew that the stipulation is that the underwriter is to run the risk of what may happen to the ship while she remains in the port of Newcastle. If we held otherwise, we should defeat the object of the shipowner in insuring in these terms, because what he intends is that his ship may be always covered. In an ordinary way a shipowner insures until a ship arrives and twenty-four hours afterwards; then he insures "at and from" for the next voyage, so that the ship is always insured. But in order to insure "at and from," he must know what the next voyage will be. It often happens he does not know, and it is convenient to him that during a certain time the ship should be

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covered, so that he may know when the risk will terminate. I cannot help thinking we should make that uncertain by saying it meant when the ship had completed the delivery of her cargo, and should defeat the object of the shipowner.

Judgment reversed, and entered for the plaintiffs.

Solicitor for plaintiffs: *W. W. Wynne, for Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Freshfields & Williams.*

Feb. 16.

HOWES AND ANOTHER *v.* YOUNG AND OTHERS.
HOWES AND ANOTHER *v.* STONE AND OTHERS.

Bankruptcy Act, 1869, *s.* 87—*Execution on Trader's Goods for a Sum exceeding 50l. without Sale—Sheriff's Poundage—Officer's Fee—Possession Money.*

4 Ch D 521
5 & 6 Vict. c. 122, s. 3, 4
5 Ch D 376
10 Ch D 170
8 Q B D 396
9 Q B D 433

A sheriff seized a trader's goods on two successive days under two writs of fi. fa., issued by two judgment creditors, each being indorsed to levy debt, interest, and costs of execution, besides sheriff's poundage, officer's fees, and all other legal incidental expenses. In one case the amount of judgment debt, interest, and costs of writ of execution was under 50*l.*, and was raised by the poundage to more than 50*l.* In the other, the amount of judgment debt, interest, costs of writ of execution, and poundage was under 50*l.*, and was raised by the officer's fee to more than 50*l.* There was no sale, and within fourteen days after the seizures the sheriff received notice of a petition for liquidation, which was filed by the trader after the seizures:—

Held, following *Ex parte Liverpool Loan Co.* (Law Rep. 7 Ch. Ap. 732), that in each case the goods were "taken in execution in respect of a judgment for a sum exceeding 50*l.*" within s. 87 of the Bankruptcy Act, 1869, and that although there had been no sale the trustee in bankruptcy was entitled to the goods.

SPECIAL CASES stated under the Common Law Procedure Act, 1860, s. 15. The questions being similar the cases were taken together.

In *Howes* v. *Young* the facts were as follows:—On the 1st of April, 1875, the defendants signed judgment in an action against one Holton, a trader, for 43*l.* 12*s.* 2*d.* debt and 4*l.* costs, and issued a writ of fi. fa., which was indorsed "levy 47*l.* 12*s.* 2*d.* and 1*l.* 8*s.* for costs of execution, &c., and also interest on 47*l.* 12*s.* 2*d.* at 4*l.* per cent. per annum from the 1st day of April, 1875, until payment, besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses." Under this writ the

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sheriff, on the 3rd of April, seized Holton's goods for the following sums:—Debt, 47*l.* 12*s.* 2*d.*; writ of execution, 1*l.* 8*s.*; interest, 2*d.*; poundage, 2*l.* 9*s.*; officer's fee, 1*l.* 1*s.*; possession, 5*s.*; total, 52*l.* 15*s.* 4*d.* In this case the poundage raised the amount from 49*l.* 0*s.* 4*d.* to 51*l.* 9*s.* 4*d.*, without reckoning the officer's fee and possession money.

On the 5th of April Holton filed a petition for liquidation under the Bankruptcy Act, 1869, thereby committing an act of bankruptcy, of which notice was, on the 14th of April, given to the defendants. On the 22nd the plaintiffs were appointed trustees under the liquidation, and on the 26th gave notice to the defendants requiring them and the sheriff not to sell the goods. On the 28th of April the sheriff took out an interpleader summons, and on the 3rd of May, Huddleston, J., after hearing the parties, made an order that upon the plaintiffs paying 75*l.* into Court and possession money to the sheriff, the sheriff should withdraw from possession, and the parties state a special case. When this order was made the goods had not been sold and were in the sheriff's possession. On the 6th of May the sheriff withdrew from possession.

The question for the Court was, whether, when the judge's order was made on the 3rd of May, the plaintiffs were entitled to the goods or the proceeds of the sale or of any part thereof as against the defendants.

In *Howes* v. *Stone* the question was the same, a similar judge's order had been made, and there was no material difference in the facts, except that Stone and others were the creditors in respect of a judgment signed the 19th of March, 1875; the writ of fi. fa. was endorsed "Levy, 45*l.* 17*s.* 2*d.*, with interest thereon at 4*l.* per cent. from 19 March, 1875, and 1*l.* 6*s.* for cost of execution besides sheriff's poundage, officer's fees, and all other legal incidental expenses;" and the seizure of Holton's goods under the execution was on the 2nd of April, and for the following sums:—Debt, 45*l.* 17*s.* 2*d.*; writ of execution, 1*l.* 6*s.*; interest, 1*s.* 4*d.*; poundage, 2*l.* 7*s.* 2*d.*; officer's fee, 1*l.* 1*s.*; possession, 5*s.*; total, 50*l.* 17*s.* 8*d.* In this case the officer's fee raised the amount from 49*l.* 11*s.* 8*d.*; to 50*l.* 12*s.* 8*d.*, without including the possession money. Notice of the filing of the petition on the 5th of April was on that day given to the defendants and the sheriff.

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Wilberforce for the plaintiffs in each case relied on *Ex parte Liverpool Loan Co.* (1)

R. H. Collins, for the defendants in *Howes* v. *Young*. That decision does not touch the present point. There the sum of 1*l.* 12*s.*, which brought the amount above 50*l.*, was for "the costs of execution," i.e., of procuring the writ to be issued. In the present case those costs make the amount only 49*l.* 0*s.* 4*d.*, and the poundage, 2*l.* 9*s.*, brings it above 50*l.* The question is whether poundage is to be reckoned so as to bring the case within s. 87 (2) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), at all events where the goods have been seized but not sold. Sect. 87 says, "and sold," and in *Ex parte Liverpool Loan Co.* (1) James, L.J., says: "This appears to me to be the plain meaning of the words, that they apply where a levy has been made for more than 50*l.* and the goods sold." To constitute an act of bankruptcy under s. 6, there must be a sale as well as seizure. When the goods are not sold s. 87 does not apply (3); at all events, poundage cannot be reckoned, for it was decided in *Miles* v. *Harris* (4) that the sheriff is not entitled to poundage where he has seized but not sold, owing to the judgment and subsequent proceedings being set aside for irregularity. *Ex parte Liverpool Loan Co.* (1) decided only that the costs of issuing the writ of execution must be reckoned. That case ought not to be extended in derogation of the common law rights of an execution creditor. There is, moreover, a plain distinction. There the costs were ascertained before levying; but the poundage cannot be ascertained till the sale. The sheriff's right to poundage (1*s.* in the pound where the sum exceedeth not 100*l.*) was given by 28 Eliz. c. 4; 43 Geo. 3, c. 46, s. 5, and s. 123 of the Common Law Procedure Act, 1852, give the party a right to levy for it. The

(1) Law Rep. 7 Ch. Ap. 732.

(2) Sect. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff, or in the case of a sale under the direction of the county court, the high bailiff, or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee. . . ."

(3) But see *Ex parte Rayner*, Law Rep. 7 Ch. 325.

(4) 12 C. B. (N.S.) 550; 31 L. J. (C.P.) 361.

execution creditor may, if he thinks proper, pay the poundage himself, and not require the sheriff to levy for it.

[BRAMWELL, B. But the indorsement on the writ commanded the sheriff to levy poundage.]

The sheriff's fees are regulated by 1 Vict. c. 55, schedule, which allows 1*l.* 1*s.* "for executing warrants," shewing that the right is not earned till the warrant is executed. So the possession money is "for each man left in possession where absolutely necessary," so much per day. The amount of possession money cannot be known till the possession is ended.

F. H. Hardcastle, for the defendants in *Howes* v. *Stone,* prayed in aid the above arguments, and pointed out that if either the poundage or the officer's fee was deducted in his case, the sum would be reduced below 50*l.* He urged that if possession money could be reckoned, a sum which was much below 50*l.* would by a prolonged possession be raised above 50*l.*, a result which could not have been intended by the Act, and that secured creditors, such as the defendants, ought not to be deprived of their security unless the legislature has plainly expressed that intention.

Wilberforce was not heard in reply.

BRAMWELL, B. I think the decision of *Ex parte Liverpool Loan Co.* (1), is decisive of these two cases, and that no doubt or difficulty arises. James, L.J., there said: "In this case two judges have decided that the 87th section applies if the sum for which the sheriff levies, including the costs of execution, exceeds 50*l.*; and that the true construction of that section is, 'taken in execution for a sum exceeding 50*l.* in respect of a judgment.' This appears to me to be the plain meaning of the words, that they apply where a levy has been made for more than 50*l.*, and the goods sold." Now, were the goods in each of the present cases so taken? There can be but one answer. The writs were indorsed with a direction to levy the judgment debt, costs of execution, and interest, in the one case, "besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses;" and in the other case, "besides sheriff's poundage, officer's fees, and all other legal incidental expenses." For these sums, which amounted in each case to more than 50*l.*, the goods were taken in execution,

(1) Law Rep. 7 Ch. Ap. 732.

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and therefore come precisely within the definition of James, L.J. I can understand the argument that possession money ought not to be included in the amount, because the words "a sum exceeding 50*l.*" must mean at the time when the goods are taken, and at that time it is uncertain what the possession money will be, or whether there will be any. But here the suggested difficulty does not arise, viz., that the sum for which the levy is made might be under 50*l.*, and might become more than 50*l.* by the addition of the possession money.

Then there was the argument that if the execution creditor is not entitled to the goods, the sheriff is not entitled to his poundage and other incidental expenses, and if so the sum is less than 50*l.*, and s. 87 of the Bankruptcy Act does not apply, and the execution creditor is entitled to the goods. That is ingenious; but the answer is that if the execution creditor is entitled to the goods, the incidental expenses bring the sum to more than 50*l.*, and then the trustee is entitled under s. 87. But the real question is, for what sum were the goods seized? Was it for a sum over 50*l.*? It was. Mr. Hardcastle's argument is open to a similar answer.

AMPHLETT, B. I am of the same opinion. It is not necessary to consider the arguments and reasons for the decision of the Lords Justices. We start with that as binding upon us, and the only question is, whether there is any reasonable distinction between the costs of execution and the costs of the necessary incidental expenses. I think there is none. I agree that the question of possession money stands on a different footing. In neither of the present cases does it depend on the possession-money to bring the sum over 50*l.*, and I give no opinion as to what our decision ought to be if it did.

HUDDLESTON, B., concurred.

Judgment for the plaintiffs trustees in both cases.

Solicitor for plaintiffs in both cases: *J. N. Mason.*

Solicitor for Young and Others: *G. E. Forster, for Hardings, Wood, & Wilson, Manchester.*

Solicitor for Stone and Others: *Charles Armstrong.*

JEPSON, APPELLANT; GRIBBLE, RESPONDENT. 1876

Jan. 28.

Inhabited House Duty—Exemption of Hospital or House for Reception or Relief of Poor Persons—14 & 15 *Vict. c.* 36, *s.* 2—48 *Geo.* 3, *c.* 55, *Sch. B.*; *Exemptions, Case* 4—*Lunatic Asylum—Detached House for Medical Superintendent resident in the Asylum*—16 & 17 *Vict. c.* 97, *ss.* 1, 2, 55, 132.

The medical superintendent of a lunatic asylum was appointed under 16 & 17 Vict. c. 97, s. 55, which enacted that he should be "resident in such asylum." He lived in a detached house, separated from the main buildings of the asylum by walls, but within the boundary of the asylum, and having ready access to the main buildings through gates in the walls. The house was specially built and occupied as the residence of the medical superintendent, was suitable for the purpose, and did not contain more accommodation than was reasonably necessary for himself and family.

Case 4 of the exemptions in 48 Geo. 3, c. 55, Sch. B., exempts from inhabited house duties "any hospital, charity school, or house provided for the reception or relief of poor persons." The main buildings of the asylum were admitted to be within the exemption:—

Held, that the medical superintendent's house was a part of the asylum, and therefore within the exemption.

CASE stated by the commissioners for executing the Acts relating to the inhabited house duties under the Customs and Inland Revenue Act, 1874, 37 Vict. c. 16, s. 9.

The City of London County Lunatic Asylum, is a lunatic asylum established under 16 & 17 Vict. c. 97, and is a hospital and house provided for the reception and relief of poor persons, that is to say, for the "lodging, maintenance, medicine, clothing, care, and treatment of pauper lunatics."

The committee of visitors of the asylum duly appointed the appellant Jepson to be the medical resident superintendent of the asylum, under s. 55, which section compelled him to reside in the asylum. His duties are defined by the Act. He lives in a separate and detached house built upon ground within the boundary of the asylum, as the servant of the committee. The house is suitable and convenient for the performance of his duties, and is allotted to him for that purpose. From the rear of the house the appellant has ready and convenient access to the main buildings of the asylum by passing through a portion of the grounds of the asylum through a gate in the wall which incloses his garden on that side. The

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front part of the garden of the appellant's house abuts immediately upon the public lane so that he has direct communication with such lane without passing through the asylum. The garden is inclosed on the right and left by brick walls, in each of which is a gate leading into the asylum grounds. (1) The house is occupied by, and was especially built as the residence of, the medical resident superintendent of the asylum, and does not contain more accommodation than is reasonably necessary for himself and family. In respect of this house, the appellant was assessed under 14 & 15 Vict. c. 36 (2), for the year 1874, ending the 5th of April, 1875, to the inhabited house duty, upon 50*l.*, at 9*d.* in the pound, making 1*l.* 17*s.* 6*d.*

The appellant contended before the commissioners that his residence formed part of the asylum, and was therefore part of a hospital and house provided for the reception and relief of poor persons, and was exempt from house duty under case 4 of the exemptions.

The respondent Gribble, surveyor of taxes for the district in which the asylum is, contended that the residence of the appellant was a separate and distinct house from the asylum, although it was situated upon the asylum land, and therefore did not fall within the exemption.

The commissioners decided on the 18th of November, 1874, that the appellant was not entitled to the exemption, but was liable to pay the 1*l.* 17*s.* 6*d.*

The Court was to be at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the appellant was liable, with respect to his said residence, to be assessed to the inhabited house duty.

Poland, for the appellant. The appellant's residence is as much within the exemption as if it were physically a part of the main

(1) A plan of the premises was attached to the case and shewn to the Court.

(2) This Act repeals former duties and imposes others, and by s. 2 enacts that certain exemptions shall continue in force, among which is case 4 of the exemptions in schedule B. of 48 Geo. 3, c. 55: "Any hospital, charity school, or house provided for the reception or relief of poor persons."

buildings of the asylum; 16 & 17 Vict. c. 97 regulates "Lunatic asylums for the maintenance and care of pauper lunatics" (ss. 1, 2); and by s. 132 (the interpretation clause), "'asylum' shall mean any asylum, house, building, or place already erected or provided" under certain statutes, "or to be erected or provided under the provisions of this Act." By s. 55, the medical officer "shall be resident in such asylum." In *Congreve* v. *Overseers of Upton* (1) it was held that a medical superintendent whose house was situated, with reference to an asylum, very much as in the present case, was "resident in such asylum." The appellant occupies not as tenant but as the servant of the committee, and is liable to be turned out of his residence without notice.

Sir J. Holker, A.G. (with him *Pinder*), for the Crown. The main buildings of the asylum are, no doubt, exempt, but the appellant's residence is neither in letter nor spirit "a hospital, charity-school, or house provided for the reception or relief of poor persons." To hold that such a residence is within the exemption is to say that one entirely detached and separate house, complete in itself, is part of another. *Congreve* v. *Overseers of Upton* (1) is not an authority on the present point. That was a question, not of house-duties or exemptions, but of rateability to the poor under a special clause, the facts being quite different to the present case. The observations of Blackburn, J., as to residence in the asylum, establish only that the medical officer complied with s. 55 of 16 & 17 Vict. c. 97, requiring him to be resident in the asylum, and they must be read with reference to the subject-matter and the decision, which was that the building in which he resided was acquired "for the purposes of the asylum." The present point has been decided in favour of the Crown in three cases heard on appeal from the commissioners by judges sitting in Serjeants' Inn under 43 Geo. 3, c. 161, s. 73, as appears from the records of those cases and of the decisions, which are preserved in the Inland Revenue Office. In the first (an Abergavenny case) the medical superintendent's house was held to be not within the exemption. That house was in the asylum grounds, and separated from the asylum by a turnpike-road which ran through the grounds. The only difference

(1) 4 B. & S. 857, 871; 33 L. J. (N.S.) (M.C.) 83.

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between that and the present case is that here the appellant's house is separated from the asylum by a wall.

[KELLY, C.B. That makes the distinction. The wall is the property of the asylum.]

So was the turnpike-road the property of the asylum, which owned the land on each side, the public having an easement over it. In the second case the judges held that the chaplain's house, which, as in the present case, was in the asylum grounds, was not exempt.

[AMPHLETT, B. The distinction is that s. 55 of 16 & 17 Vict. c. 97 does not require the chaplain to be resident in the asylum.]

The construction of an exemption in 48 Geo. 3, c. 55, cannot depend on whether another statute requires residence within the asylum, nor on whether that requirement is obeyed. It may be that the present appellant is disobeying s. 55, or even that his appointment was invalid within that section. In the third case the governor and chaplain of a gaol each resided in a house separate from the gaol itself, but within the grounds of the gaol, the governor's house forming part of the boundary of the gaol with two fronts, one towards a public road and the other towards the gaol yard. Coleridge, Maule, and Williams, J.J., held that the governor's and chaplain's houses were not exempt from house duty. That case was not—like the two others—a decision upon the present exemption in favour of a "house for the reception or relief of poor persons," but the position was analogous.

Poland replied.

KELLY, C.B. It is perfectly clear that this lunatic asylum is within the words of case 4 of the exemptions—"any hospital, charity school, or house provided for the reception or relief of poor persons." The only question is, whether the medical superintendent's house is part of the premises of the asylum. It is within the curtilage, and is provided for the residence of a person whose attendance may at any moment be required for the inmates of the asylum, and who ought, therefore, to be always at hand. Under these circumstances I hold, without any doubt, that the legislature intended that what is substantially part and parcel of the asylum

shall be exempt, unless there be some recognised decision given by a superior Court to the contrary effect. Of the revenue cases referred to, only one resembles the present. There the medical superintendent's house was on the other side of a public road, and it is therefore clear that, though upon the premises, it was not part of the asylum. In the present case I think the appellant's house is part and parcel of the asylum, and therefore exempt.

AMPHLETT, B. I am of the same opinion, and for the same reasons, and I should have had no doubt even were there no authority on the question; but *Congreve* v. *Overseers of Upton* (1), though a case of poor-rate, has a strong bearing on the present point, because the question was whether the medical superintendent was resident in the asylum, and therefore was very much the same as in the present case. There were two appellants, the chaplain and the medical superintendent of the lunatic asylum, who had each been rated for their respective houses. With regard to the chaplain, it was not necessary that he should be resident, and it was held that since his house was not used "for the purposes of the asylum" within the statute, he must be rated for his house at the actual value. But with regard to the medical superintendent, Mr. Justice Blackburn says (2): "The statute expressly directs, by s. 55, that he shall be resident in the asylum. Mr. Welsby argued that the words 'in such asylum' must be construed to mean strictly within the curtilage of the building where the patients sleep at night—a place which might be so laid in an indictment for burglary. But that is not a reasonable meaning of those words. They mean that his residence must be in grounds appropriated to the asylum, so as to be reasonably within it. Now, looking at the position of the building as described in this case, we cannot say that it was not *in the asylum* if we once assume that it need not be under the actual roof." The position of the medical superintendent's house was much the same as in the present case; and since it is necessary that there should be (as in that case) a resident medical officer, and that he should be accommodated with a proper house, whether it be actually part of the main

(1) 4 B. & S. 857; 33 L. J. (N.S.) (M.C.) 83; 10 Jur. N.S. 538

(2) 4 B. & S. 871; 10 Jur. N.S. 540

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buildings of the asylum or not, it is a necessary adjunct, and is therefore part of the asylum.

As to the cases cited from the revenue books, there is none which exactly fits the present. The nearest is, perhaps, that of the governor of the gaol; but there there was no such exemption as in the present case, nor any exemption unless on the ground that the house was in the occupation of the Crown, and the judges thought it was not. It has, therefore, no direct bearing on the present case.

HUDDLESTON, B. I am of the same opinion. Even without any interpretation clause it is clear that the asylum itself would be within the exemption, because the case expressly finds that it "is a hospital and house provided for the reception and relief of poor persons." I think that the grounds are a portion of the asylum, and the medical superintendent's house is built on part of the grounds. In the modern method of treating lunatics the gardens and grounds are almost as necessary as the dormitories or any part of the buildings. I think, therefore, within the strict meaning of the words, the medical superintendent's house is part of the asylum.

With regard to the cases referred to as having been decided by the judges in Serjeants' Inn, I have no doubt that the records existing in the Inland Revenue Office have been accurately drawn up; but I protest against its being supposed that those cases are binding on us as decisions. The reasons for the decisions are not given, the records have not the guarantee of a reporter known to the public, and they are never laid before the public so as to be discussed and to enable any mistakes which there may be in the reports to be detected. Moreover, none of the cases cited are conclusive of the present point.

Judgment for the appellant.

Solicitor for the appellant: *Nelson.*

Solicitor for the respondent: *Solicitor to the Inland Revenue.*

[IN THE COURT OF APPEAL.]

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Feb. 25.

ELLIS AND ANOTHER *v.* EMMANUEL AND ANOTHER.

Creditor and Surety—Suretyship for Whole of ascertained Debt with Liability limited to less Sum — Construction of Instrument—Right of Surety to reduce his Liability by rateable Proportion of Dividends paid under Bankrutpcy of principal Debtor.

Where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (primâ facie at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not primâ facie to be construed as a security for part of the debt only. It is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only.

A debtor and his surety executed a joint and several bond for 14,000*l.* conditioned for avoidance if they or either of them should, in satisfaction of a debt of 7000*l.* then due from the debtor to the obligee, pay the 7000*l.*, with a proviso that the surety should not be liable under the bond for a sum or sums exceeding altogether in debt or damages 1300*l.* The debtor having paid 1000*l.*, part of the debt, and then filed a petition for liquidation, the obligee proved for and received a dividend of 9*s.* 2*d.* in the pound on 6000*l.* under the liquidation. After deducting from the 7000*l.* the 1000*l.* and the dividend, there remained more than 1300*l.* due. The obligee having brought an action on the bond against the surety to recover 1300*l.*, the surety contended that he was entitled to deduct from the 1300*l.* a rateable proportion of the dividend, viz. 9*s.* 2*d.* in the pound on 1300*l.*, and was only liable for the balance:—

Held (affirming the judgment of the Court of Exchequer), that the intention of the bond was that the surety should guarantee the whole 7000*l.*, though his liability was limited to 1300*l.*; that he was, therefore, not entitled to deduct a rateable proportion of the dividend, but was liable for the whole 1300*l.*

Gray v. *Seckham* (Law Rep. 7 Ch. 680), and the series of cases there followed, distinguished.

APPEAL from a judgment of the Court of Exchequer on a special case stated under a judge's order by consent.

The action was on a bond, dated the 8th of December, 1869, by which one Etheridge, who owed the plaintiffs 7000*l.*, and seven other parties, bound themselves, and every two and more and each of them jointly and severally in the sum of 14,000*l.*, to be paid to the plaintiffs.

The bond was conditioned for avoidance if the obligors, or any

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or either of them, should in satisfaction of the debt of 7000*l.* and interest pay the plaintiffs 7000*l.* with interest at the times and by the instalments therein mentioned, or (at the option of the plaintiffs) the whole of the principal sum, or the unpaid part thereof, if any instalment was in arrear for three months.

There was a proviso that each of the four several parties mentioned, namely, the two defendants (taken as one party), one Wilmot and two other parties, who were sureties only for Etheridge, should not be liable under the bond (whether by reason of a joint or of a several action or demand) to be sued in any such action, except only for so much of the instalments amounting in the whole to 7000*l.* as at the time of any such default should then be due and payable, but so that nevertheless the joint or several liability of the said four parties should not be prejudiced or compromised in respect of any other of the instalments afterwards becoming due.

Provided that the said four parties "shall not nor shall either of them be liable under or by virtue of the said bond (whether by reason of a joint or of a several action or demand) for a sum or sums exceeding altogether in debt or damages 1300*l.*

Then followed similarly worded provisoes limiting the liability of two others of the seven sureties to 700*l.*, and of the seventh to 400*l.*

Etheridge duly paid two instalments of 500*l.* each with interest. Afterwards, on the 6th of April, 1871, he filed a petition for liquidation under the Bankruptcy Act, 1869, and his creditors resolved that his affairs should be liquidated by arrangement, and a trustee was appointed.

In that month the plaintiffs proved against Etheridge's estate under the liquidation a debt of 6020*l.* 11*s.*, which was the whole amount then due in respect of the principal and interest secured by the bond.

The whole of Etheridge's estate was realized and divided among his creditors, and four dividends were before this action paid under the liquidation amounting to 9*s.* 2*d.* in the pound, and the plaintiffs received as the dividends on their proof 2759*l.* 8*s.* 2*d.*

Wilmot, one of the first four sureties, having been sued for instalments on the bond by the plaintiffs, paid them 405*l.* 11*s.* for

principal and 22*l.* 11*s.* 6*d.* for interest. (1) After deducting from the principal sum of 7000*l.* and interest the instalments paid by Etheridge, the dividends of 9*s.* 2*d.* in the pound, and the amount recovered from Wilmot, there remained unpaid more than 3000*l.*, and the plaintiffs maintained that the defendants were liable for 1300*l.* of this. (2)

The defendants maintained, first, that the entire liability of the first four sureties (of whom they were one) was limited to 1300*l.* and interest, and that they were entitled to deduct from the 1300*l.* the amount recovered from Wilmot, one of the four parties; secondly, that they were entitled to the benefit of so much of the dividend of 9*s.* 2*d.* in the pound as related to the 1300*l.*, viz. to 9*s.* 2*d.* multiplied by 1300, or 595*l.* 16*s.* 8*d.*; and that after deducting these two items from the 1300*l.* and interest there remained a sum less than the 450*l.* which they had paid into court.

The Court were to draw any inferences of fact which a jury might properly have drawn, and to make any amendment in the pleadings which they might deem necessary.

The question for the Court was, whether the defendants upon the facts stated were entitled to judgment. If not, judgment was to be entered for the plaintiffs for the penalty of the bond, and execution was to issue for such sum as the Court should direct.

1875. June 7. The case was argued by *Manisty, Q.C.* (*Petheram* with him), for the plaintiffs, and *Giffard, Q.C.* (*Prentice, Q.C.*, and *C. Gould* with him), for the defendants, before the Court of Exchequer (Bramwell and Cleasby, BB.), who held that on the true construction of the bond each of the first four sureties (of whom the defendants were one) were liable to pay 1300*l.*, and that the plaintiffs were entitled to issue execution for 1300*l.*, less the amount paid into Court. (2)

Judgment for the plaintiffs.

From this decision the defendants appealed.

(1) See *Ellis* v. *Wilmot*, Law Rep. 10 Ex. 10.

(2) When this action was brought, in 1874, some of the instalments were not due, but it was agreed between counsel during the argument that the Court should decide the principle of the defendant's entire liability without reference to the date of the action, and that the calculation of the figures, including the interest, should be arranged between the parties.

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1875. Nov. 20. *Giffard, Q.C.*, and *C. Gould*, for the defendants, appellants. 1. The proviso limits the entire liability of the first four sureties (of whom the defendants are one) to 1300*l.* in all, and the defendants are liable at most for the balance of 1300*l.*, after deducting the amount paid by Wilmot. 2. The defendants are entitled to the benefit of so much of the dividends of 9*s.* 2*d.* in the pound received by the plaintiffs as are applicable to 1300*l.*, or, in other words, 9*s.* 2*d.* multiplied by 1300. It is clear the defendants would have been entitled to the ordinary rights of a surety, i.e. to pay the 1300*l.* upon the default of the principal debtor, and then to stand in the creditor's place and prove for and receive the dividends on 1300*l.* under the liquidation; and it cannot make any difference that they have waited for the creditor to sue. The principle that the surety is entitled to a proportionate part of the dividends has been established by a long series of cases, of which it is sufficient to refer to *Bardwell* v. *Lydall* (1), *Thornton* v. *M'Kewan* (2), *Hobson* v. *Bass* (3), and *Gray* v. *Seckham.* (4) If it is intended that the surety shall not have this benefit, but that he shall be liable for the whole balance of the debt after the creditor has received the dividends, it must be distinctly expressed, as in *Midland Banking Co.* v. *Chambers* (5), which was approved by Mellish, L.J., in *Gray* v. *Seckham.* (4) There is nothing in the bond to shew that the defendants had contracted themselves out of the ordinary rights of suretyship. This question of dividends was not clearly raised in the Court below, nor dealt with by the judgment, and it must not be supposed that the learned barons expressed any opinion adverse to the defendants on this point.

Manisty, Q.C. (*Petheram* with him), was heard on the second point only.

Gould replied.

LORD CAIRNS, L.C., said that, as to the first point, the Court had no doubt that, upon the true construction of the bond, each of the four parties—the defendants' firm being treated as one individual party—were liable for 1300*l.*, and that the plaintiffs were entitled

(1) 7 Bing. 489.
(2) 1 H. & M. 525; 32 L. J. (Ch.) 69.
(3) Law Rep. 6 Ch. 792.
(4) Law Rep. 7 Ch. 680.
(5) Law Rep. 4 Ch. 398.

to recover 1300*l.* from each of those four parties in succession, 700*l.* from each of the two next parties, and 400*l.* from the seventh surety. These sums, added together, made exactly 7000*l.*, and this construction gave the plaintiffs the security of the sureties for the whole of the 7000*l.*, which was clearly the intention of the bond. The defendants' construction would give the plaintiffs the security of the sureties for 2400*l.* only. The defendants were therefore not entitled to deduct from the 1300*l.* the amount recovered from Wilmot.

But, on the second point, as to the right to deduct the proportion of dividends, which had been argued with great force by Mr. Gould, the Court would take time to consider the authorites.

Cur. adv. vult.

1876. Feb. 23. The judgment of the Court (Lord Cairns, L.C., Blackburn and Brett, JJ.) was read by

BLACKBURN, J. In this case Thomas Robert Etheridge, as principal debtor, and others (seven in all, if we reckon each firm as a separate person), as sureties, executed a bond to the plaintiffs.

The instrument is not in all respects artificially drawn, but in substance it is this. The eight persons bound themselves, and every two or more and each of them, jointly and severally, in the penal sum of 14,000*l.* The condition of the bond was that if the eight parties, or any or either of them, paid the principal sum of 7000*l.* by certain instalments, at times specified, the bond should be void and of none effect, otherwise it should remain in full force. Then followed a proviso, on the effect of which we expressed our opinion at the time of the argument.

And then a second proviso, that four of the sureties, including the now defendant "shall not nor shall either of them be liable under or by virtue of the said bond, whether by reason of a joint or of a several action or demand, for a sum or sums exceeding altogether in debt or damages 1300*l.*"

Then a similarly worded proviso, that two others of the sureties shall not be made liable for more than 700*l.*; and another proviso, that the seventh surety shall not be liable for more than 400*l.* The

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aggregate of those four sums of 1300*l.*, two of 700*l.*, and one of 400*l.*, is exactly 7000*l.*

I think, on the construction of this instrument, that the whole seven sureties jointly and severally guaranteed the whole 7000*l.*, and therefore, that any one of them might be forced to pay more than his just proportion of what remained due. For example, if the principal debtor paid off 6000*l.*, leaving 1000*l.* only due, any one of the first four sureties might have been forced to pay the creditor the whole 1000*l.* But, on paying more than his just proportion, he would be entitled to contribution from the other sureties, on the ground that they were all liable for the same debt. The limits put on the amounts which could be recovered from the sureties respectively would affect the amount which each was to contribute, but would not prevent their being all liable to contribution.

But if the bond had been framed, as it might have been, so that each surety did not guarantee the whole 7000*l.* jointly with the others, but that each of the four first-named sureties should each guarantee severally 1300*l.*, parcel of the 7000*l.*, and that each of the two next named should each guarantee severally 700*l.*, other parcel, and the last surety guarantee severally 400*l.*, the residue, the result would be different. There, if 6000*l.* was paid off, the creditor probably would be impliedly bound to apply the payments rateably to every part of the 7000*l.*, or at least might easily, by express stipulation, be bound to do so; and if he did so apply them, he could not recover the whole 1000*l.* remaining due from one of the sureties in the first category; for, six sevenths of the 1300*l.* being paid off, the surety would only be liable for the remaining seventh, or 145*l.* some shillings and pence, and no more; and there could be no contribution between the sureties, because they were not liable for the same debt.

The practical difference between the two forms of security would be that in the first case the creditor can recover the whole from any of the sureties who are solvent, leaving to them the trouble of getting contribution from the others, and throwing on them the loss if any of their co-sureties became insolvent. This is an advantage which a creditor may fairly stipulate for, and which we have no right to take away from him if he has stipulated for it.

In the case now before us the principal debtor made a liquidation arrangement at a time when 6020*l.* 11*s.* of the 7000*l.* originally secured to the plaintiffs on the bond remained unpaid. They proved for that amount, and received dividends amounting to 9*s.* 2*d.* in the pound on that amount. But after giving credit for that amount, considerably more than 1300*l.* was due on the bond at the time when the Court below were applied to to allow execution to issue. The Court of Exchequer have allowed execution to issue (1) for 850*l.*, the difference between 450*l.* paid into Court and 1300*l.*, the limit of the defendant's liability.

It was contended that they were wrong. It was said that the dividends are by law applied to each pound of the debt rateably, which is unquestionably true; and it was argued that the defendant was entitled to take credit for 9*s.* 2*d.* in the pound on the 1300*l.*, just as he would have been if his contract had been not to be surety for the whole 7000*l.*, with a proviso limiting his liability to 1300*l.*, but to be surety for 1300*l.*, parcel of the 7000*l.* If this was so, the amount for which execution has been allowed to issue is considerably too large. I have, however, come to the conclusion that the Court below were right.

The real question, I think, is, whether a series of cases beginning with *Ex parte Rushforth* (2), decided by Lord Eldon in 1805, and ending with *Gray* v. *Seckham* (3), decided by the Lords Justices in 1871, apply to this case. These decisions are several of them in Courts of Appeal of co-ordinate jurisdiction with this Court, and are clearly binding upon us; and I do not think we ought to make nice distinctions, or depart from these cases, unless there is a real solid distinction between these cases and the present. But I think there is a real solid distinction.

I think that the class of cases referred to do not lay down any general doctrine that where there is a surety, with a limit on the amount of his liability, for the whole of a debt exceeding that limit, he is entitled to the benefit of a rateable proportion of the dividends paid on the whole debt; but only that where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the

(1) Ante, p. 159, n. (2).

(2) 10 Ves. 409.

(3) Law Rep. 7 Ch. 680.

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principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt, co-extensive with the amount of his guarantee; and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety.

In *Ex parte Rushforth* (1) Lord Eldon seems to me to express this very plainly. There Richard Rushforth, the petitioner, had, along with the two bankrupts, entered into a joint and several bond for 10,000*l.* to bankers, conditioned for the payment, from time to time and at all times thereafter within two months after notice in writing, of the balance that might be then due from the bankrupts to the bankers. At the time of the bankruptcy that balance was 20,000*l.* The bankers proved that amount, and received dividends on it.

Lord Eldon considered the matter much. He first, in March, 1804, after discussing all the points, ends an elaborate judgment by saying (2): "The rule certainly has been that where a man, engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid. That brings it to the question, what is this engagement, whether for the whole or a part?" Another petition was presented, and final judgment was not given till the 5th of February, 1805, after nearly a year's consideration, and then Lord Eldon says (3): "The question comes round to this; whether, according to the true nature of such an engagement between all the parties in this bond and mortgage, it was competent to these bankers to go on without giving notice to the surety; for this is a case in which they contracted to give him notice before forfeiture of the bond; whether they were at liberty to swell the demand to his prejudice beyond the sum of 10,000*l.* The agreement was to advance all such sums as should be required; but it is limited by an express contract for an obligation to secure all those sums; and the question is, whether that limitation in the extent of the obligation is not a sufficient ground for the inference that those sums were not to be extended beyond 10,000*l.*

(1) 10 Ves. 409. (2) 10 Ves. at p. 420.
(3) 10 Ves. at p. 422.

to the destruction of every right of the surety. Take the case of two sureties, each for the separate sum of 10,000*l.*: each paying the principal creditor would be entitled to stand in his place for the sum paid. It would be very strong to hold that, as they have taken but one surety, he shall be in a worse situation. I think the bankers are not entitled in equity to say, as against the surety, that their demand is more than 10,000*l.*, the amount of the bond he has given, upon which he would be primâ facie entitled to stand in their place: as to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers." He adds: "As this is a perfectly new case, I make the order with liberty to file a bill."

Lord Eldon, in deciding this case, attaches much weight to the stipulation for notice. Subsequent decisions—*Ex parte Holmes* (1) and *Gray* v. *Seckham* (2)—have settled that the result would have been the same had there been no such stipulation; but what seems to me important is, that Lord Eldon's reasoning proceeds entirely on the ground that the surety was entitled *in equity* to treat this as a security for 10,000*l.*, part of the balance, because the bankers voluntarily swelled the balance beyond the 10,000*l.*; a reason not at all applicable to a security given for a sum already fixed and determined.

The next case in order of date was *Paley* v. *Field* (3), in 1806, before Sir William Grant. There the bond was conditioned for the payment of the floating balance due to the bankers, with a proviso that the surety should not be liable to pay "any sums of money to a larger amount than the sum of 1500*l.*," the meaning of the parties being that the bankers should not be indemnified by the surety by virtue thereof for any loss which they should sustain by giving credit to the debtor beyond the sum of 1500*l.* Sir William Grant rests his judgment almost entirely on this proviso. He says (4): "I hardly know how the parties could have more clearly provided, not merely that the plaintiff should not be called on to answer more than 1500*l.*, but that with regard to him the creditor should be considered as limited to that sum."

The next case in order of date that I find reported is *Bardwell*

(1) Mont. & Ch. 301.
(2) Law Rep. 7 Ch. 680.
(3) 12 Ves. 435.
(4) 12 Ves. at p. 444.

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v. *Lydall* (1), before the Court of Common Pleas in 1831. There the guarantee was, "of any debt which the principal may contract from time to time as a running balance of account to any amount not exceeding 400*l.*" The decision of the Court was that the same rule applied at law as in equity. The Court say (2); "the amount of the debt does in this case exceed the 400*l.*, and thereby the position of the creditor is so far altered that one part of his debt, viz. to the extent of 400*l.*, is guaranteed, and the remainder not." In coming to this conclusion, that the guarantee was to be read as between the creditor and surety, even at law as a guarantee for 400*l.*, parcel of the balance, and not as a guarantee of the whole balance with a limit on the amount recoverable, the Court seem to have acted on *Paley* v. *Field* (3), but perhaps carry the doctrine one step further than either Lord Eldon or Sir William Grant had done.

In *Raikes* v. *Todd* (4), in 1838, the Court of Queen's Bench decided the case on another ground, viz. that the guarantee was bad under the Statute of Frauds; but Lord Denman during the argument says that if that had not been so, they should have followed *Bardwell* v. *Lydall.* (1)

The next case is *Ex parte Holmes* (5), before Lord Cottenham in 1839, sitting in appeal in bankruptcy. In that case the petitioner accepted three bills of exchange, amounting in all to 523*l.* 15*s.* 6*d.*, for the accommodation of the bankrupt. The bankrupt deposited them with his bankers as a security for the floating balance. The petitioner was, therefore, a surety to the extent of 523*l.* 15*s.* 6*d.* to meet a floating balance, but from the manner in which the suretyship was created no such special ground as the notice in *Ex parte Rushforth* (6) or the proviso in *Paley* v. *Field* (7) could exist, nor could anything turn on special words in the guarantee. The balance greatly exceeded 523*l.* 15*s.* 6*d.*, and the bankers proved and received a dividend of 2*s.* on the whole. Then the petitioner paid the bills. The Court of Review had allowed the petitioner the future dividends on the 523*l.* 15*s.* 6*d.*, but refused to

(1) 7 Bing. 489.
(2) 7 Bing. at p. 493.
(3) 12 Ves. 435.
(4) 8 A. & E. 846, 855.
(5) Mont. & Ch. 301, 316.
(6) 10 Ves. 409.
(7) 12 Ves. 435.

make the bankers account for the 2*s.* in the pound already received by them. Lord Cottenham upon appeal said very truly that this was illogical, and that the petitioner was entitled to both or neither. He then refers to the fact that the bills were deposited to secure a floating balance, which in the result exceeded their amount. He cites *Bardwell* v. *Lydall* (1), *Paley* v. *Field* (2), and *Ex parte Rushforth* (3), and then says (4): "If then the dividend received upon 523*l.* 15*s.* 6*d.* is to be attributed to that portion of the debt which was secured by the bills of Holmes, it is immaterial that the bankers had larger or other demands against the bankrupt." It seems to me that the principle he assumes is that a security of limited amount for a floating balance is, as between surety and creditor, a security for a portion of the balance only, and that the residue is unsecured.

In *Thornton* v. *M'Kewan* (5), in 1862, Wood, V.C., followed these decisions, and had no occasion to enter into an explanation of the principle.

In *Gee* v. *Pack* (6), in 1863, an action was brought in the Court of Queen's Bench on this guaranty: "300*l.* On demand we jointly and severally promise to pay to Messrs. Gee & Co." (who were bankers), "300*l.*, with interest on same, to secure an advance now or hereafter on a banking account with Messrs. Pack & Linton." The question raised on demurrer to a plea was, whether the surety was entitled to credit for a proportionate part of the dividends received by Gee & Co. on the balance of their banking account, which, at the time the principal debtors entered into liquidation, exceeded 300*l.* The decision was in favour of the surety on the ground that the case was undistinguishable from *Bardwell* v. *Lydall.* (1)

In *Hobson* v. *Bass* (7), Lord Hatherley, in 1871, acting upon all these cases, states the question thus: "If a person guarantees a limited portion of a debt, all the authorities shew that if he pays that portion, he has in respect of it all the rights of a creditor. The question is, whether the guarantor means 'I will be liable for

(1) 7 Bing. 489.
(2) 12 Ves. 435.
(3) 10 Ves. 409.
(4) Mont. & Ch. at p. 318.
(5) 1 H. & M. 525; 32 L. J. Ch. 69.
(6) 33 L. J. (Q.B.) 49.
(7) Law Rep. 6 Ch. at p. 794.

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250*l.* of the amount which A. B. shall owe you,' or 'I will be liable for the amount which A. B. shall owe you, subject to this limitation that I shall not be called upon to pay more than 250*l.*' The words of this guaranty are so similar to those in some of the cases cited that it would be splitting hairs to distinguish them. The words 'at any time' are material, and I think the meaning of the instrument is, 'I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding 250*l.* When it reaches that sum I am to be a surety for it with all the rights of a surety.'"

The last case on the subject that I am aware of is *Gray* v. *Seckham.* (1) There the suretyship was by means of a promissory note deposited by the principal with his bankers as a security for the floating balance, and the case so far was identical with *Ex parte Holmes.* (2) Lord Justice Mellish, in delivering judgment, states the point thus: (3) "Upon this the question arises whether there is anything to take this case out of the ordinary rule that, when a surety is only surety for part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged."

I have now cited and examined every case of which I am aware bearing on this subject. In every one of them the limited suretyship was to secure a floating balance. And I think these decisions establish that in such a case the suretyship is, primâ facie at least, to be construed as a security for a part only of the debt, from which the consequence stated by Lord Justice Mellish follows. And I agree with what is intimated by Lord Hatherley in *Hobson* v. *Bass* (4), that if a creditor, taking a limited security for a floating balance, means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the primâ facie construction is the other way, and the Court ought not to split hairs or make nice verbal distinctions on the words used.

But there is no case that I am aware of which lays down that where the suretyship limited in amount is for a debt already

(1) Law Rep. 7 Ch. 680.
(2) Mont. & Ch. 301.
(3) Law Rep. 7 Ch. at p. 683.
(4) Law Rep. 6 Ch. at p. 794.

ascertained which exceeds that limit, it is primâ facie to be construed as a security for part of the debt only. And I have failed to see any principle on which such a primâ facie construction ought to be adopted.

I think in such a case it is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only. And, as I have already pointed out, I think the bond in the present case expresses an intention that the sureties should each guarantee the whole 7000*l.*, though their liability respectively was limited to the stipulated amounts.

It seems, therefore, to me, that the Court below were altogether right, and that the judgment should be affirmed.

The Lord Chancellor and my Brother Brett concur in this judgment, and in the reasoning on which it is founded.

Judgment for the plaintiffs affirmed.

Solicitors for plaintiffs: *Jones, Blaxlands, & Son, for J. Miller, Bristol.*

Solicitors for defendant: *R. & E. Bastard, for C. H. Edwards, Birmingham.*

[IN THE COURT OF APPEAL.]

Feb. 3.

RUMMENS *v.* HARE AND RUMMENS.

Gift of Document of Title—Handing over Policy of Insurance without Assignment—Right to retain Policy, as against Administratrix of Donor.

4 C.L.D. 424

In detinue by an administratrix for a policy of insurance, the evidence was that the intestate had given the policy to the defendant. No assignment was executed, but the defendant retained the policy, and had possession of it at the time of the intestate's death:—

Held, affirming the judgment of the Exchequer, that the action was not maintainable, for though there had been no assignment of the policy and the right to the money secured by it might not be affected, the right to the document itself passed by the gift to the defendant.

APPEAL from the decision of the Court of Exchequer discharging a rule to set aside the verdict for the defendants and for a new trial on the ground of misdirection.

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RUMMENS v. HARE.

The cause was tried before Cleasby, B., at the Middlesex Sittings after Hilary Term, 1875. The plaintiff was the administratrix of J. G. Rummens, who died intestate, and the action was in detinue for a policy of insurance effected by the intestate in the Briton Medical and General Life Association on his own life, and two receipts for premiums paid thereon, the plaintiff alleging that she had been delayed in proceeding to obtain payment of the policy and in administering the proceeds thereof. There was also a count in trover for the conversion of the documents.

The defendant Hare was a solicitor, and the other defendant was the mother of the intestate; the former was joined as defendant because the documents were in his possession, but otherwise he had no interest in the policy. The defendant Sarah Rummens claimed the policy as her property.

At the trial evidence was adduced that, in consequence of a conversation as to the means that his mother would have in case of his death, the intestate had handed the policy to her with the remark, "If I die there is the policy." He afterwards paid two premiums to the company, and received receipts, which he handed also to his mother. No notice was given to the insurance company and no assignment was executed. Subsequently to this the intestate married the plaintiff, who on his death became his administratrix. The insurance company declined to pay on the policy unless it was produced, and the plaintiff consequently brought this action to recover possession of it.

The question left to the jury was whether the intestate transferred to his mother the right to the possession of the document. The jury found that he did so, and returned a verdict for the defendants.

A rule obtained for a new trial, on the ground of misdirection, was discharged by the Court (1) on the authority of *Barton* v. *Gainer*. (2)

On appeal,

Tapping, for the plaintiff. *Barton* v. *Gainer* (2) does not govern this case, for the policy was not given as a paper writing

(1) Kelly, C.B., Cleasby and Pollock, BB.

(2) 3 H. & N. 387; 27 L. J. (Ex.) 390.

merely, but with the full intention of passing the interest under it. *Searle* v. *Law* (1) is an authority the other way.

[MELLISH, L.J. There the document was only claimed on the ground that the plaintiff had a beneficial interest under it, so this question was not raised.]

30 & 31 Vict. c. 144, ss. 3, 5, require that an assignment should be in writing, and that notice should be given to the insurance company; that has not been done here.

[MELLISH, L.J. The plaintiff could have no greater interest in the policy than the intestate had. Could he, if he had wanted to borrow money on the security of it, have brought an action against his mother to recover it?]

Not having formally assigned it, so as to bind himself, he could have recovered it.

Grantham, for the defendants, was not called upon.

LORD CAIRNS, L.C. This is an action, not involving any question with regard to the right to the money secured by the policy of insurance, but for the detention of the paper writing only. I say this because very different considerations apply to proceedings for recovering the security itself, and to proceedings for the recovery of that which is the subject of the security. The facts may be assumed to be these. The intestate having insured his life, and being doubtful what means his mother would have in case of his death, gave her the policy, and told her she might keep it. This she did, and afterwards, the intestate having paid two premiums, gave the receipts to his mother, which she also kept. After his death, he having married in the meantime, his widow, as his administratrix, sued the mother to recover the policy. The Court of Exchequer, on the authority of the case of *Barton* v. *Gainer* (2), held that the administratrix could not maintain trover for the recovery of the policy. We think the decision was quite right. This was a gift of the policy, and although there was no consideration for it, yet it was a valid gift to the mother with whatever advantage she could obtain from it. As has been pointed out by the Lord Justice during the argument, the intestate could not have claimed to have the document returned to him, nor can his

(1) 15 Sim. 95. (2) 3 H. & N. 387; 27 L. J. (Ex.) 390.

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administratrix now claim it. We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may not be able to recover the document, which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself; but with that we have nothing to do.

LORD COLERIDGE, C.J., and MELLISH, L.J., concurred.

Judgment affirmed.

Solicitor for plaintiff: *A. S. Hatchett Jones.*
Solicitors for defendants: *Wilson & Son; Wood & Hare.*

Feb. 9.

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2 Ex. D. 45.

Estoppel—Detention of Goods under 15*l. Value within Metropolitan Police District—Application to Magistrate for Order to deliver up Goods—Refusal of Order—Action of Trover for same Goods—*2 *&* 3 *Vict. c.* 71, *s.* 40.

A person, who has applied to a magistrate within the metropolitan police district for an order under 2 & 3 Vict. c. 71, s. 40, for the delivery up of goods not exceeding 15*l.* in value, which order is, after inquiry, refused, is not precluded, by having taken these proceedings, from bringing an action of trover for the goods.

DECLARATION for the conversion of plaintiff's goods (to wit) a set of patent joiner's cramps, a set of harness, and a goat.

Fourth plea, as to so much of the declaration as relates to the set of harness, that the plaintiff ought not to be admitted to say that the defendant converted the same to his own use, or that the same were the plaintiff's, because the alleged conversion took place after the 25th of August, 1839 (1), and consisted of the detention

(1) The date of the passing of the Metropolitan Police Act, 2 & 3 Vict. c. 71, by s. 40 of which it is enacted: "that upon complaint made to any of the said magistrates by any person claiming to be entitled to the property or possession of any goods which are detained by any other person within the limits of the metropolitan police district, the value of which shall not be greater than 15*l.*, and not being deeds, muniments, or papers relating to any property of greater value than 15*l.*, it shall be lawful for such magistrate to summon the person complained of, and to inquire into the title thereto or to the possession thereof, and if it shall appear to the magistrate that such

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by the defendant within the limits of the metropolitan police district of the said goods the value of which was not greater than 15*l.*, whereupon afterwards and before this suit the plaintiff duly made his complaint before one of the magistrates of the police courts of the metropolis sitting at the Lambeth police court, for that the defendant unlawfully and without just cause detained the said goods, which the plaintiff then alleged to be his property, and to the property and possession of which goods the plaintiff then claimed to be entitled; whereupon the magistrate duly summoned the defendant to appear to answer the complaint, and to shew cause why an order should not then and there be made upon him to deliver the goods to the plaintiff. And the defendant, in obedience to the summons, duly appeared at the time and place therein mentioned, and the magistrate heard the case and the subject-matter of the complaint, and inquired into the title to the goods and the defendant's possession thereof. And the magistrate decided and adjudged that the defendant had title to the goods, and to possession thereof, and the plaintiff had no title thereto, or to the possession thereof; and he dismissed the summons, and thereby adjudicated the subject-matter of the complaint in favour of the defendant; and the defendant has ever since held possession of

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goods have been detained without just cause, after due notice of the claim made by the person complaining, or that the person detaining such goods has a lien or right to detain the same, by way of security for the payment of money or the performance of any act by the owner thereof, it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof either absolutely, or upon tender of the amount appearing to be due by such owner (which amount the magistrate is hereby authorized to determine), or upon performance or upon tender and refusal of the performance of the act for the performance whereof such goods are detained as security, or if such act cannot be performed, then upon tender of amends for non-performance thereof (the nature or amount of which amends the magistrate is hereby authorized to determine); and every person who shall neglect or refuse to deliver up the goods according to such order, shall forfeit to the party aggrieved the full value of such goods, not greater than the sum of 15*l.*, such value to be determined by the magistrate: provided always, that no such order shall bar any person from recovering possession of the goods or money so delivered or forfeited, by suit or action at law, from the person to whose possession such goods or money shall come by virtue of such order, so that such action be commenced within six calendar months next after such order shall be made."

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the goods on the said title, and the plaintiff has never since acquired any title or right to the possession of the goods other than he had at the time of the magistrate's decision; and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to be admitted, against the decision of the magistrate, to say that the goods at the time of the alleged conversion were his goods.

Demurrer and joinder.

Prentice, Q.C., for the plaintiff, in support of the demurrer. The proceedings before the magistrate were auxiliary to and not in substitution for any proceedings the plaintiff might take to recover his property. The decision of the magistrate refusing the order is no bar to further proceedings. [He referred to *Rex* v. *Jenkin* (1), and *Reg.* v. *Machen.* (2)]

A. B. Kempe, contrà. The question in dispute between the parties here is the same as that before the magistrate, though the form of proceeding is different, and the defendant ought not to be put to defend his title twice: *Routledge* v. *Hislop.* (3) The plea says that the magistrate inquired into the title to the goods, as he is bound to do under the statute, in order to decide whether the goods shall be given up absolutely or on terms, and he could not have refused the order without determining the question of title. Here, as in *Flitters* v. *Allfrey* (4), the plaintiff has chosen his own tribunal, and when the judgment has gone against him, proceeds in another court, not by way of appeal, but, as pointed out by Grove, J., in that case, only under a different procedure. The proviso at the end of the section shews that the plaintiff is bound by the decision, while the right of the defendant, who has no choice whether he will be brought there or not, to question the magistrate's decision is not to extend beyond six months. [He referred to *Commings* v. *Heard* (5), and *Gibbs* v. *Cruikshank.* (6)]

Prentice, Q.C., in reply, was not heard.

KELLY, C.B. The object of the statute 2 & 3 Vict. c. 71, s. 40,

(1) Ca. K. B. temp. Hard. 301.
(2) 14 Q. B. 74; 18 L. J. (M.C.) 213.
(3) 2 E. & E. 549; 29 L. J. (M.C.) 90.
(4) Law Rep. 10 C. P. 29.
(5) Law Rep. 4 Q. B. 669.
(6) Law Rep. 8 C. P. 454.

5 Jur. N.S. 398

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was to give to a magistrate power to order the delivery up of goods of small value; but I am of opinion that he has no power to determine the property in the goods. If we look to the section we see that it gives power to the magistrate to inquire into the title to the goods, and make any one of the series of orders set out in the section. But here no one of those orders has been made by the magistrate; he has not exercised the powers he possessed of making those orders, but has simply dismissed the summons. If he had made any of those orders the defendant would not be without remedy if he could prove his lawful ownership, for the proviso gives him six months in which to question the magistrate's decision. With regard to the plaintiff, there is no limitation of any common-law or statutory right which he might be possessed of to try and recover his goods by other proceedings. Supposing the goods to be those of the plaintiff, and the magistrate's decision to be erroneous, the plaintiff would, if the contention for the defendant is right, be deprived of his goods without any power whatever of appealing. I think the magistrate has power to inquire into title so far as may enable him to make any order under the Act; but that where he does not make any order, the plaintiff is not precluded from his remedy elsewhere.

CLEASBY, B. I think that the authorities that have been cited were properly decided. If the jurisdiction of the magistrate were to give judgment, that could not afterwards be questioned, but in this case the power given is to make orders on the conclusion he may form as to the title to the goods. He must therefore inquire into the title; but his decision is not like a judgment, because it appears by the proviso that the defendant may question it. I think the magistrate has no power to determine absolutely the property, and that it would be monstrous if, after he has formed his judgment, the party against whom it was should be precluded from appealing. The proviso has been relied on; but the reason for the limitation in the case of the defendant to six months in which to bring his action seems to me to be that, after the order of the magistrate to deliver up the goods is executed and the goods handed over, six months is a reasonable time in which to test the correctness of the order and recover back the goods that

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have been handed over. This is not an anomalous proceeding, for it is like the process by which possession is recovered of cottages of small value. An order is made, but the person against whom the order is made is not conclusively bound by it, but may bring an action of trespass. I think the magistrate has only to form a conclusion so as to found an order, and that therefore the plaintiff is not precluded by the magistrate's decision from bringing this action.

HUDDLESTON, B., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *Evans & Eagles.*
Solicitor for defendant: *Geo. H. Finch.*

Jan. 17.

VANCE *v.* LOWTHER.

Banker's Cheque—Alteration of Date—Materiality.

A person intrusted with a cheque by the payee to pay into a bank absconded with it, and after altering the date from the 2nd of March to the 26th of March, passed it to the plaintiff for value. The cheque was not paid, and the plaintiff, who had not been guilty of any negligence in taking the cheque, sued the drawer:—

Held, that the alteration was material, and invalidated the cheque; and that the circumstance that the plaintiff had not been guilty of negligence in taking it was immaterial.

APPEAL from the county court of Lancashire, holden at Manchester.

The action was on a cheque drawn by the defendant on the Manchester and County Bank, Limited, in favour of Mr. S. Bagnall, or bearer. The cheque was entrusted to Campbell, a clerk of Bagnall, to be paid to his account at a bank. The clerk absconded with the cheque, and after altering the date from the 2nd of March, 1875, to the 26th of March, 1875, passed it to the plaintiff for value. Payment of the cheque had, in the meanwhile, been countermanded, and on presentation of the cheque payment was refused.

The learned judge found as a fact that the plaintiff had not been guilty of negligence in taking the cheque, and he held that

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under the circumstances the alteration of the cheque was not material, and a verdict was entered for the plaintiff.

The question for the opinion of the Court was whether the verdict for the plaintiff was right.

Crompton, for the defendant, appellant, was stopped, and the Court called on

Baylis, Q.C. (*Julian Robinson* with him), for the plaintiff. A cheque need not be dated at all, and the date on the cheque is not material. In *Bull* v. *O'Sullivan* (1) a post-dated cheque was admitted in evidence in an action by the indorsee against the drawer. In *Master* v. *Miller* (2) the alteration of the date of a bill of exchange, so as to accelerate the payment, was held to avoid it, and perhaps if the date of payment of this cheque had been accelerated it would have been made void, but merely deferring payment ought not to be held to have that effect, as a banker does not look to the date of a cheque, but is bound to pay it, however old it may be. [He referred also to *Austin* v. *Bunyard* (3), and *Hirschman* v. *Budd.* (4)] Further, the finding of the county court judge is on a mixed question of law and fact, and cannot, therefore, be reviewed unless it is manifest that the conclusion arrived at must have been founded on an erroneous view of the law: *Cawley* v. *Furnell.* (5)

Crompton, in reply. The alteration was material. The date of the cheque ear-marks it; as, for instance, if it is required to give any direction as to paying it. Further, the banker might have failed in the interval between the 2nd of March and the 26th of March, and the date is most material, for otherwise the drawer might be called on to pay. [He was then stopped.]

KELLY, C.B. I have no doubt that the decision in this case must be reversed. The defendant drew a cheque, dated the 2nd of March, which got into the hands of a person who absconded with it. The defendant thereupon countermanded payment. Subsequently, the date of the cheque was altered to the 26th of March, and it was put in circulation. The question is, whether

(1) Law Rep. 6 Q. B. 209.
(2) 1 Sm. L. C. 7th ed. 871; 4 T. R. 320; 2 H. Bl. 140.
(3) 6 B. & S. 687; 34 L. J. (Q.B.) 217.
(4) Law Rep. 8 Ex. 171.
(5) 12 C. B. 291; 20 L. J. (C.P.) 197.

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that alteration is material. The county court judge seems to have treated the question of materiality as one of fact; but that question frequently arises, as in cases of insurance, as a question of law; and in the present case we have to decide whether what was done was in law a material alteration which vitiated the cheque. The materiality may be tried by several tests, of which I propose to refer to two. First, can it be doubted that, when the date of a cheque is altered as this was from the 2nd to the 26th of the month, the legal obligation of the drawer is materially altered? In the former case the obligation of the banker was to pay the cheque on presentment on any day from the 2nd onwards, while in the other case there is no obligation to pay until the 26th. The authority to the banker to pay on the 2nd of the month has therefore been altered, and I think that a cheque payable at once and one payable at a future date are as different as two bills of exchange drawn at one and two months respectively.

The other test is that suggested in argument. If the drawer of the cheque has money at the bank at the time of drawing it, but the bank fails before it is presented, the question of the liability of the drawer turns on the diligence used in presenting the cheque, which shews conclusively that the date is material.

POLLOCK, B. I am of the same opinion. Any material alteration of a bill or note invalidates it, and the question is, what is the true principle on which the materiality must be determined. The county court judge seems to have thought that it was necessary to consider the surrounding circumstances in each case. In that I think he was wrong, and that we ought to look at the question of materiality with reference to the contract itself, and not with reference to the surrounding circumstances. Taking this view of the case, I think this alteration was material, and that the cheque was void.

HUDDLESTON, B., concurred.

Judgment for the defendant.

Solicitor for plaintiff: *T. W. Goldring.*

Solicitors for defendant: *Le Riche & Son, for Payne & Galloway, Manchester.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

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Jan. 27.

CLEMSON *v.* HUBBARD.

Master and Servant—Absence without Leave—Jurisdiction of Justices—"Dispute"—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.

By the Employers and Workmen Act, 1875, s. 4, "a dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction." By s. 10 the expression "court of summary jurisdiction" includes justices.

The plaintiff, a boot manufacturer, summoned the defendant, a workman, before justices for absenting himself from the plaintiff's employment without notice; the justices having dismissed the summons for want of jurisdiction:—

Held, that absence by a workman from his employer's service constituted a "dispute" between them within the meaning of the foregoing enactment, and that the decision of the justices was erroneous.

Case stated by justices of the borough of Derby under 20 & 21 Vict. c. 43.

The plaintiff, a boot manufacturer, caused a summons, under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, to be issued against the defendant, a workman, to appear before justices, and delivered under Rule 1, made pursuant to s. 9 of that statute, the following particulars of his cause of action:—

"Edward Hubbard: Debtor to Mr. John Clemson.

"1875, 27th Sept.

"To damage and loss caused by your absenting yourself from my employment from this date without giving previous notice, and whereby I have suffered damage to the amount of five pounds:—5*l*."

At the hearing, the attorney for the plaintiff stated that the defendant had contracted with the plaintiff as a cutter out in his trade of a boot manufacturer at weekly wages; that on Saturday, the 25th of September, 1875, the defendant finished his current week's work, and received his wages; that having given no notice or intimation of his intention to leave the plaintiff's service, he had absented himself on Monday morning, the 27th, and had not afterwards resumed his work, nor offered any explanation of his conduct.

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Thereupon the defendant's attorney objected that the plaintiff, upon his own shewing, was out of court, for there was no "dispute" arising out of or incidental to the relation of employer and workman, inasmuch as the defendant, until the present moment, had had no distinct intimation that the plaintiff claimed from him a week's notice, and hence had had no opportunity of disputing that claim; that the foundation of the justices' jurisdiction in all cases under the Act was the fact of the existence of such a "dispute;" but that the plaintiff's particulars shewed that the present was a simple action for damages, which the county court might well entertain under its common-law jurisdiction, but which neither it nor the justices had power to try under the Employers and Workmen Act.

It was urged for the plaintiff that a "dispute" within the meaning of the statute existed.

The justices dismissed the summons.

The question for the opinion of the Court was, whether the justices had jurisdiction to hear and determine the case.

J. C. Lawrance, for the plaintiff. The decision of the justices was erroneous. There was clearly a "dispute" between the parties within the meaning of the 4th section of the Employers and Workmen Act, 1875. (1) The 4th section of the Master and Servant

(1) The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3, enacts: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act) the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers; that is to say (1.), It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and (2.) if, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just; and (3.) where the court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the court for the performance by him of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security, and

Act, 1867 (1), now repealed, expressly specified absence from service as a matter over which justices should have jurisdiction;

order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages."

Sect. 4: "A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: Provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—(1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and (2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case; and (3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties."

Sect. 9: "Any sum payable by any person under the order of a court of summary jurisdiction in pursuance of this Act shall be deemed to be a debt due from him in pursuance of a judgment of a competent court within the meaning of the 5th section of the Debtors Act, 1869, and may be enforced accordingly; and as regards any such debt a court of summary jurisdiction shall be deemed to be a court within the meaning of the said section.

"The Lord Chancellor may at any time after the passing of this Act, and from time to time make, and when made, rescind, alter, and add to rules for carrying into effect the jurisdiction by this Act given to a court of summary jurisdiction, and in particular for the purpose of regulating the costs of any proceedings in a court of summary jurisdiction, with power to provide that the same shall not exceed the costs which would in a similar case be in-

(1) The Master and Servant Act, 1867 (30 & 31 Vict. c. 141), s. 4, enacts: "Wherever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or commence his service according to the contract, or shall absent himself from his service, or whenever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property of either of the parties under any contract of service, the party feeling aggrieved may lay an information or complaint in writing before a justice, magistrate, or sheriff, setting forth the grounds of complaint, and the amount of compensation, damage, or other remedy claimed for the breach or non-performance of such contract, or for any such misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property of the party so complaining."

The Master and Servant Act, 1867, is repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17.

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and it is submitted for the plaintiff that the intention of the legislature in passing the Employers and Workmen Act, 1875, was not to limit the authority of justices, but merely to remove the supposed grievance of treating breaches of a contract for service as matters of a criminal nature.

The defendant did not appear.

Buszard, for the justices. There was no "dispute" between the parties; the fact that a workman does not return to his service may afford his employer a ground of complaint, but assuredly it is not, in ordinary language, a dispute. The wide words of the Master and Servant Act, 1867, s. 4, which contemplated this very case, are carefully and advisedly omitted from the present statute. If the legislature had intended that justices should have power to entertain mere complaints, it would have said so in express terms; thus in 20 Geo. 2, c. 19, s. 1, and in 4 Geo. 4, c. 34, s. 2, the words used were, "complaints, differences, and disputes" between masters and workmen or apprentices. It is not denied that the absence of the defendant from his employment was intentional; but a dispute requires that two minds shall be at variance

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curred in a county court, and any rules so made, in so far as they relate to the exercise of jurisdiction under the said 5th section of the Debtors Act, 1869, shall be deemed to be prescribed rules within the meaning of the said section."

Sect. 10: "The expression 'the Summary Jurisdiction Act,' means the Act of the session of the 11th and 12th years of the reign of Her present Majesty, c. 43, intituled 'An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales with respect to summary convictions and orders,' inclusive of any Acts amending the same.

"The expression 'court of summary jurisdiction' means . . . . any justice or justices of the peace to whom jurisdiction is given by the Summary Jurisdiction Act."

Rules pursuant to s. 9 were made by Lord Cairns, L.C., and dated the 13th of August, 1875.

Rule 1: "A person desirous to enter an action under the Employers and Workmen Act, 1875, shall deliver to the clerk of the court particulars in writing of his cause of action, and the clerk of the court shall enter in a book, to be kept for this purpose in his office, a plaint in writing, stating the names and the last-known places of abode of the parties, and the substance of the action intended to be brought; and thereupon a summons shall be issued according to the form in the schedule, and be served on the defendant not less than one clear day before the day on which the court shall be holden at which the cause is to be tried."

with each other, just as there must be two parties to a contract; and when the proceedings were commenced before the justices no difference of opinion had been expressed. The proper remedy of the plaintiff would have been by an action for damages in a county court under its ordinary jurisdiction. By s. 9 of the Employers and Workmen Act, 1875, a workman may be imprisoned under the Debtors Act, 1869; now the legislature intended to remove the hardship of allowing a defaulting workman to be treated as a criminal; and it would defeat that object if justices were empowered to send to a prison a workman who does not pay the damages awarded by them; the construction contended for by the plaintiff would make the law more stringent against the employed than it was before.

Lawrance was stopped in reply.

CLEASBY, B. We do not think it necessary to hear any further reply on behalf of the plaintiff. The question before us depends upon the meaning of the words in the 4th section of 38 & 39 Vict. c. 90, "a dispute under this Act between an employer and a workman." It has been suggested in argument that there was no dispute between the parties, for at the time of taking proceedings before the justices no difference of opinion had been expressed between them; and that as there must be two persons to make a contract, so there must be two minds to express dissent from each other; but this is, in effect, an argument that there can be no "dispute" unless the workman agrees that it shall exist; such a construction would almost annul the statute; and it would be absurd to hold that the justices shall have no jurisdiction unless the parties confer it by agreement. Under s. 4 the justices up to a certain amount are to have the same powers as are conferred by s. 3 upon the county courts; and it is plain from the provisions of the last-mentioned section, that the jurisdiction is to depend upon the existing state of facts and not upon the agreement of the parties. It has been argued that, as by 30 & 31 Vict. c. 141, s. 4, absence from service is expressly mentioned, the omission of similar words in the statute before us shews that the legislature did not intend to confer upon justices jurisdiction to decide questions as to absence from service; but I cannot help

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seeing that by 30 & 31 Vict. c. 141, s. 4, it was intended to enumerate and include particular instances, whereas by 38 & 39 Vict. c. 90, ss. 3 and 4, it was intended to comprehend them under one head. It seems to me most unreasonable to hold that the word "dispute" has only the limited sense contended for on behalf of the justices; the plaintiff has made a complaint which they were bound to entertain. The case must be remitted for rehearing.

GROVE, J. I am of the same opinion. The jurisdiction to hear a complaint of this kind has, in my judgment, been clearly created. The case, in effect, finds that the defendant, without having given notice, absented himself from the plaintiff's service. It is not denied that he intentionally absented himself. It would be a singular result of legislation to hold that the justices have no jurisdiction upon the present facts; but to lay down that they would have had power to determine the case if the defendant before absenting himself had said to the plaintiff, "I dispute your right to require my services," would go to shew that almost a submission to arbitration is required before the justices can entertain the summons; their jurisdiction would depend simply upon the agreement of the parties. As to the argument that it is inconvenient to give power to imprison for mere breaches of contract, it is to be recollected that the power can be exercised under s. 9 of 38 & 39 Vict. c. 90, only when the person ordered to pay has had means to pay and has omitted so to do. The case must be remitted for the justices to deal with.

FIELD, J. I am entirely of the same opinion. It would be a bad day for workmen if they were driven for redress to the county court, and could not resort to the cheap and easy remedy afforded by magistrates.

Case remitted.

Solicitor for plaintiff: *Henry Tyrrell, for A. J. Flint, Derby.*
Solicitors for justices: *W. & W. H. Whiston & Cooper, Derby.*

[IN THE COURT OF APPEAL.]

1876
Jan. 31.

LE MARCHANT *v.* THE COMMISSIONERS OF INLAND REVENUE.

Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), s. 38—*Allowance for Loss of Annuity on Succession—Deprivation of Property on taking Succession.*

The tenant for life in possession and his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; and by a deed of even date in consideration of the son's intended marriage, appointed the estates to the use of trustees in fee from and after the marriage by way of mortgage to secure 20,000*l.*, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1870, pay to the trustees 20,000*l.*, with interest at 3*l.* per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; and the father covenanted that if the marriage was solemnized he would, so long during his life as the 20,000*l.* or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at 3*l.* per cent.; provided that if he should pay the interest half yearly the trustees should not during his life call in the 20,000*l.* or any part; and the deed witnessed that the trustees should stand possessed of the 20,000*l.* upon the trusts declared by the marriage settlement of even date, viz. upon trust to pay the annual income thereof to the son for life, and after his decease to his wife for life, with the usual trusts over for children.

The marriage was solemnized, and the son received under the deeds 600*l.* a year, being the interest on 20,000*l.* at 3*l.* per cent., until his father's death in 1874, when he became entititled in possession to the estates, and the 600*l.* a year ceased:—

Held (affirming the judgment of the majority of the Court of Exchequer), that the case was covered by the principle of *Commissioners of Inland Revenue* v. *Harrison* (Law Rep. 7 H. L. 1), and that on taking his succession to the estates the son was "bound to relinquish," or was "deprived of" the 600*l.* a year within s. 38 of the Succession Duty Act, 1853, and was entitled to an allowance accordingly, upon the computation of the assessable value of his succession.

APPEAL from a judgment of the Court of Exchequer of the 7th of July, 1875, upon a petition by Sir Henry Le Marchant that in assessing the duty upon his succession to certain estates an allowance should be made under s. 38 of the Succession Duty Act, 1853, in respect of an annuity of 600*l.* a year which he ceased to enjoy when he succeeded to the estates.

The facts and deeds are fully stated in the report of the case below. (1) For the present purpose they sufficiently appear from the head-note, and the Lord Chancellor's judgment.

(1) Law Rep. 10 Ex. 292.

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The Court of Exchequer (Kelly, C.B., and Bramwell, B., Cleasby, B., dissenting) held that the petitioner was entitled to the allowance.

W. W. Karslake (*Sir J. Holker, A.G.*, and *Sir H. Giffard, S.G.*, with him), for the commissioners, appellants, contended that the judgment of Cleasby, B., was the right one, and also that the case came within s. 34 of the Act, and not s. 38. (1) His arguments and the authorities cited were the same as in the Court below. (2)

Thesiger, Q.C., and *A. L. Smith*, for the petitioner, respondent, were not heard.

LORD CAIRNS, L.C. I own it appears to me that there is no reasonable doubt in this case. The petitioner, Sir Henry Le Marchant, was about to be married. His father, Sir Denis, being tenant for life, and Sir Henry being tenant in tail of estates in Surrey, it was proposed to bring these estates into settlement, in order to make immediate provision for the husband and wife, and for the children. Obviously there were various ways in which that might be done, assuming that Sir Denis was willing—as it appears he was—to surrender part of his beneficial interest as tenant for life. Provision might have been made by the grant of a rent charge to the husband and to the wife if she should survive her husband, during the life of the father; and for the children provision might have been made either by a division of the estates,

(1) 16 & 17 Vict. c. 51, s. 34, enacts: "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, have laid out in the substantial repairs or permanent improvement of real property comprised in his succession: Provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value pro tanto of such real property."

Sect. 38 enacts: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property."

(2) Law Rep. 10 Ex. 298–300.

or by successive estates limited to them, or by money being raised as portions or by way of mortgage.

The course adopted was this: the form of provision was by a mortgage for 20,000*l.*; that is to say, the estates were limited to trustees to raise 20,000*l.*; but there was a proviso that if the father should fulfil the covenant I am about to mention the money should not be raised during his life. That covenant was, that the father should, so long during his life as the 20,000*l.* should be owing, pay 600*l.* a year—being the interest upon the mortgage money at 3 per cent.—to his son Sir Henry, and if the son died leaving a widow, then 600*l.* a year to the widow, and after the decease of the survivor the capital sum was raisable.

The case says that, after the marriage, and during the father's life, the 600*l.* a year was paid regularly to the son by the father, according to his covenant. Therefore, in substance, putting aside the question of conveyancing, which is merely one of form, the son was in beneficial possession of the estate to the extent of 600*l.* a year during the father's life. He was receiving, not the rents and profits of the estate specifically, as might have been the case if a rent charge had been granted, but 600*l.* a year as the price by which the father secured that the 20,000*l.* should not be raised in his lifetime. In common sense and common expression the son was benefiting by the estate to the extent of 600*l.* a year during the father's life; and when, upon his father's death, the son succeeded to the estate, he relinquished, or ceased to have, the 600*l.* a year.

If this arrangement had been made through the form of a rent-charge the case would have been identical with *Commissioners of Inland Revenue* v. *Harrison.* (1) In form it is not identical, but in substance it is just the same. It is a case in which Sir Henry on taking a succession, was "bound to relinquish," or was "deprived of" what he had received during his father's life, received not as a sum in gross, but with reference to this particular estate; and, therefore, it is exactly the case in which an allowance ought to be made. I think, therefore, that the judgment of the majority of the Court below was right.

(1) Law Rep. 7 H. L. 1.

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LORD COLERIDGE, C.J. I am of the same opinion. I do not presume to say that there can be no reasonable doubt, looking at the difference of opinion in the Court below, but there is no doubt in which I share. The case seems directly within the principle of *Commissioners of Inland Revenue* v. *Harrison*. (1) I am unable to answer the question which Baron Bramwell put in the Court below (2) except as he answers it,—"Does the petitioner at present enjoy his estate and 600*l*. a year? He does not, that is quite certain. Therefore, though he has got the estate, he has lost, or been deprived of, or ceased to enjoy, the 600*l*. a year."

MELLISH, L.J., concurred.

Judgment for the petitioner affirmed with costs.

Solicitors for petitioner: *Paterson, Snow, & Burney.*
Solicitor for The Crown: *Solicitor of Inland Revenue.*

Feb. 10.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

MORANT, APPELLANT; TAYLOR, RESPONDENT.

11 & 12 *Vict. c.* 43, *ss.* 1, 11—*Jurisdiction of Justices—Limitation of Time—Rule as to Words ejusdem generis—Complaint—"Order for the Payment of Money or otherwise."*

The words, "order for the payment of money or otherwise," in 11 & 12 Vict. c. 43, s. 1, include orders of every kind which a justice of the peace has authority to make; and, therefore, where a local Act for the improvement of a borough provided that if buildings should be erected "contrary to any requirement by the corporation," the corporation might "make complaint thereof before a justice," who was empowered to make an order directing the demolition of the building:—

Held, that, pursuant to 11 & 12 Vict. c. 43, s. 11, the complaint upon which an order for demolition was to be founded must be made within six months after the completion of a building erected contrary to the provisions of the local Act.

CASE stated by the stipendiary magistrate for the borough of Leeds under 20 & 21 Vict. c. 43.

On the 22nd of October, 1875, the appellant, acting as agent on

(1) Law Rep. 7 H. L. 1. (2) Law Rep. 10 Ex. at p. 303.

behalf of the mayor, aldermen, and burgesses of Leeds, made a complaint, that the respondent had made a building contrary to a certain requirement by the corporation of the borough, and thereby had infringed the provisions of s. 22 of the Leeds Improvement Act, 1869. (1)

It was proved that the respondent was the owner of three houses, which were built contrary to the requirement by the corporation duly made in accordance with the provisions of the Acts referred to in s. 22 of the Leeds Improvement Act, 1869. The houses were completed more than six months before the 22nd of October, 1875, the day on which the appellant made his complaint; having been so completed, the houses remained in the same state down to that day.

The magistrate dismissed the complaint upon the ground that it came within 11 & 12 Vict. c. 43, s. 1 (2), and, therefore, under

(1) The Leeds Improvement Act, 1869 (32 Vict. c. xi.), recites various local statutes relating to the borough of Leeds, and enacts by s. 22, "In case any building be made or begun without or not in accordance with the consent of the corporation, where their consent is by this or any of the recited Acts required, or contrary to any requirement by the corporation made in accordance with the provisions of such Acts, the corporation may make complaint thereof before a justice, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged on the work, to appear at a place and time stated in the summons to answer the complaint; and if at the time and place appointed in the summons, and whether the person summoned appear or not, the complaint be proved to the satisfaction of the justice before whom it is heard, the justice shall make an order in writing on the person summoned, directing the demolition, within such time as the justice deems reasonable, of the house, building, erection, or addition, or so much thereof as is made otherwise than in accordance with the consent, or contrary to the requirement, of the corporation, and also directing payment of the costs up to and including the costs of the order."

(2) 11 & 12 Vict. c. 43 is intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales, with respect to summary convictions and orders." The preamble and the commencement of s. 1 are as follows:—"Whereas it would conduce much to the improvement of the administration of justice within England and Wales, so far as respects summary convictions and orders to be made by Her Majesty's justices of the peace therein, if the several statutes and parts of statutes relating to the duties of such justices in respect of such summary convictions and orders were consolidated, with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by such positive enactment:

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s. 11 of that statute ought to have been laid within six calendar months of the day when the building of the houses was completed.

be it, therefore, declared and enacted, That in all cases where an information shall be laid before one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales, that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice or justices, for which he is liable by law, upon a summary conviction for the same before a justice or justices of the peace, to be imprisoned or fined or otherwise punished, and also in all cases where a complaint shall be made to any such justice or justices, upon which he or they have, or shall have, authority by law to make any order for the payment of money or otherwise, then and in every such case it shall be lawful for such justice or justices of the peace to issue his or their summons directed to such persons, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place before the same justice or justices, or before such other justice or justices of the same county, riding, division, liberty, city, borough, or place as shall then be there, to answer the said information or complaint, and to be further dealt with according to law."

Sect. 11: "In all cases where no time is already, or shall hereafter be, specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

Sect. 14: "Where such defendant shall be present at such hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he have any cause to shew why he should not be convicted, or why an order should not be made against him, as the case may be, and if he thereupon admit the truth of such information or complaint, and shew no cause, or no sufficient cause, why he should not be convicted, or why an order should not be made against him, as the case may be, then the justice or justices present at the said hearing shall convict him or make an order against him accordingly."

Sect. 17: "In all cases of conviction, where no particular form of such conviction is or shall be given by the statute creating the offence or regulating the prosecution for the same, and in all cases of conviction upon statutes hitherto passed, whether any particular form of conviction have been therein given or not, it shall be lawful for the justice or justices who shall so convict to draw up his or their conviction on parchment or on paper in such one of the forms of conviction (I. 1—3), in the schedule to this Act contained, as shall be applicable to such case or to the like effect; and where an order shall be made, and no particular form of order is or shall be given by the statute giving authority to make such order, and in all cases of orders to be made under the authority of any statutes hitherto passed, whether any particular form of order shall therein be given or not, it shall be lawful for the justice or justices, by whom such order is to be made, to draw up the same in such one of the forms of orders (K. 1—3),

The question for the opinion of the Court was, whether the magistrate was right in dismissing the complaint upon the ground aforesaid.

Jan. 29; Feb. 3. *Maule, Q.C.* (*Sanderson Tennant* with him), for the appellant. The decision of the magistrate was erroneous. The complaint under s. 22 of the Leeds Improvement Act, 1869, was not a complaint upon which a justice has authority by law to make "an order for the payment of money or otherwise" within the first section of 11 & 12 Vict. c. 43, and therefore the limitation of six months contained in the 11th section does not apply. The words "or otherwise" must be confined to orders ejusdem generis with those for the payment of money. In *Reg.* v. *Hannay* (1), it was held by the Court of Queen's Bench that an adjudication of justices as to the value of an interest in

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in the schedule to this Act contained, as may be applicable to such case, or to the like effect; and in all cases where by any Act of Parliament authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress for not obeying any order of a justice or justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress shall issue in that behalf, and such order or minute shall not form any part of such warrant of commitment or of distress."

Sect. 18: "In all cases of summary conviction, or of orders made by a justice or justices of the peace, it shall be lawful for the justice or justices making the same, in his or their discretion, to award and order, in and by such conviction or order, that the defendant shall pay to the prosecutor or complainant respectively such costs as to such justice or justices shall seem just and reasonable in that behalf; and in cases where such justice or justices, instead of convicting or making an order as aforesaid, shall dismiss the information or complaint, it shall be lawful for him or them, in his or their discretion, in and by his or their order of dismissal, to award and order that the prosecutor or complainant respectively shall pay to the defendant such costs as to such justice or justices shall seem just and reasonable; and the sums so allowed for costs shall in all cases be specified in such conviction or order, or order of dismissal aforesaid, and the same shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, then such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of such distress by imprisonment, with or without hard labour, for any time not exceeding one calendar month, unless such costs shall be sooner paid."

(1) 44 L. J. (M. C.) 27.

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land, under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 22 & 24, can be made more than six months after the service of the notice to treat, for it is not an "order" within 11 & 12 Vict. c. 43, s. 1. The respondent may rely upon *Re Edmundson* (1), but that case was doubted in *Reg.* v. *Hannay* (2), and can hardly be deemed to be sound law. *Brutton* v. *Vestry of St. George's, Hanover Square* (3), was really decided upon the ground that proceedings had been taken against the wrong person; it is true that some expressions of Malins, V.C., appear to favour the contention for the present respondent; but in the *Vestry of Bermondsey* v. *Johnson* (4), the judges of the Court of Common Pleas did not concur with the Vice-Chancellor's remarks. In *Sweetman* v. *Guest* (5), Cockburn, C.J., expressed a clear opinion, that 11 & 12 Vict. c. 43, applies only to those complaints upon which an order for the payment of money may be made. Moreover, that statute relates to matters of a penal nature, and therefore it cannot extend to a complaint and order under the 22nd section of the Leeds Improvement Act, 1869, which is merely intended to regulate the mode of erecting buildings within the borough.

John Forbes, for the respondent. The decision of the magistrate was right. *Reg.* v. *Hannay* (2) is not in point for the present case; for it was there held that in point of fact the magistrate was not required to make an order. In the *Vestry of Bermondsey* v. *Johnson* (4) the decision was no doubt right upon the question argued; but counsel appeared only upon one side, and the effect of 11 & 12 Vict. c. 43, s. 11, was not brought before the attention of the Court. The words of this statute are very wide, and were no doubt intended to apply to every judicial proceeding before justices. If the contention for the appellant is adopted by the court, a complaint may be made and an order for demolition obtained twenty or even fifty years after some small infringement of a requirement by the corporation has been committed in building a house. This shews that great hardship may be occasioned, if the limitation in 11 & 12 Vict. c. 43, s. 11, does not exist in the present case.

(1) 17 Q. B. 67.
(2) 44 L. J. (M. C.) 27.
(3) Law Rep. 13 Eq. 339.
(4) Law Rep. 8 C. P. 441.
(5) Law Rep. 3 Q. B. 262.

Maule, Q.C., in reply. If no proceeding for the infringement of a requirement by the corporation can be taken after the lapse of six months, a considerable deviation therefrom may be without remedy, merely because some small mistake may be committed in legal procedure, and delay may in consequence be caused: this, it is submitted, would be an absurd result.

CLEASBY, B. We all are of opinion that the magistrate was right in dismissing the complaint. The question to be decided is whether a complaint under the 22nd section of the Leeds Improvement Act, 1869, is a complaint within the 1st section of 11 & 12 Vict. c. 43. We have had arguments ab inconvenienti addressed to us upon either side: on the one hand, it has been urged that it would be a hardship to hold liable for all time a person who has slightly deviated from the requirements of the corporation; and, on the other hand, it has been contended that it would be absurd not to remedy under the local statute a considerable deviation, because some small mistake has been committed in the legal procedure, and has not been remedied until after the six months have elapsed. I am not much impressed by either of these arguments, but upon general principles I rather incline to the respondent's view. We must, however, decide this case upon the words of the statute. It is to be recollected that it is practically impossible to specify every case to which an Act of Parliament is intended to be applied, and that it is necessary to draw up an enactment in general terms. The important words here used are, "any order for the payment of money or otherwise." Now, bearing in mind that the legislature cannot foresee every case, and that there is in the statute no definition of an "order," I must endeavour to find out what interpretation is most agreeable to its general meaning. I cannot come to the conclusion that the rule as to words ejusdem generis applies here. I cannot think that the expression "or otherwise" was intended merely to meet cases of a similar kind to orders for the payment of money. The 17th section provides for drawing up "orders" generally, and is not confined to orders for the payment of money, and those of a like kind. This section refers to the forms K 1 to K 3 in the schedule as precedents. I will not go through them at length; I need

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only remark that K 1 and K 2 are each headed "Order for Payment of Money;" whereas K 3 is headed "Order for any other matter where the disobeying of it is punishable with Imprisonment," and in the body thereof it contains the words, "I do therefore adjudge the said A. B. to (here state the matter required to be done)." It is clear from the heading and language of K 3 that the legislature intended 11 & 12 Vict. c. 43 to apply to other orders than those for the payment of money, and the terms of the 17th section shew that the form K 3 is merely a general precedent for orders as to other matters than the payment of money, whether or not they are enforceable by imprisonment. These reasons satisfy me that the complaint in the present case was within 11 & 12 Vict. c. 43, ss. 1, 11, and that the magistrate was right in his decision. This appeal must be dismissed.

GROVE, J. I am of the same opinion. At first, upon looking at the expression "or otherwise," I thought that it fell under the ordinary rule of construction as to Acts of Parliament when special words are followed by general words, and that it was to be considered as applying only to orders ejusdem generis with those for the payment of money; but upon a review of the provisions contained in 11 & 12 Vict. c. 43, I have come to a different conclusion, and I now think it beyond dispute that the words "or otherwise" apply to orders of every kind other than those for the payment of money. The title is hardly to be deemed a portion of the Act, and I do not lay very much stress upon it; but I may remark that there the word "orders" is used without restriction, and in the preamble also it is employed in an unlimited sense. The first section empowers justices to issue a summons, first, upon an information as to an offence for which a person is liable upon a summary conviction "to be imprisoned, fined, or otherwise punished;" secondly, upon a complaint where they "have authority by law to make any order for the payment of money or otherwise." Therefore the jurisdiction of justices under this section is divided into two branches; and it seems to me that the distinction intended to be drawn is between summary convictions which relate to criminal matters, and orders which relate only to civil matters. The legislature, as I think, intended stress to be laid upon the word "order,"

which therefore has a wide signification, and it seems to me to follow that the words "or otherwise" include orders of every kind other than those for the payment of money. In one sense fines very much resemble orders for payment of money; but it is clear that they cannot fall within the words "or otherwise," for they are expressly alluded to in the other branch of the first section as to informations and summary convictions; and this is another reason for excluding the rule as to words ejusdem generis. The same distinction between convictions and orders is to be found in other portions of 11 & 12 Vict. c. 43, as, for instance, in ss. 14, 17, 18; in all of these "order" is mentioned without restriction. Upon coming to the schedule attached to the Act I find the distinction drawn between summary convictions and orders still more marked; the forms I 1, I 2, I 3 relate to convictions, and K 1 and K 2 to orders for payment of money; but K 3 relates to an "order for any other matter" than the payment of money. K 3 is merely a precedent, and clearly shews that by the word "order" the legislature contemplated every kind of decision pronounced judicially by a justice in a civil matter. For these reasons I think that the dismissal of the complaint was right, and that the judgment of the magistrate must be affirmed.

FIELD, J. I also think that the decision of the magistrate was right. The question before us is, whether a complaint upon which an order for the demolition of a house may be made is a complaint within the meaning of the first section of 11 & 12 Vict. c. 43. Now, I think that the order for demolition falls naturally within the words "order for the payment of money or otherwise." It was argued for the appellant that the rule as to ejusdem generis must be applied, and that the general words must be confined to things of the same description as the preceding special words. It would have been a powerful argument in favour of the application of this rule, if the appellant's counsel could have pointed out any kind of order, which could be said to be ejusdem generis with an order for the payment of money and yet could fall within any fair interpretation of the words "or otherwise"; but this they failed to do. I am somewhat influenced by the argument ab inconvenienti; for if the contention for the appellant is to prevail, an order to de-

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molish a house may be made against an innocent purchaser without notice, because, many years before, some slight deviation from a requirement of the corporation has been committed in building it: for it is very possible that a purchaser at a subsequent time may have no means of learning that the deviation has occurred. The occupier may commit the act of disobedience, and yet if 11 & 12 Vict. c. 43, s. 11, does not apply, the owner may be long after held liable. I think that the legislature must have intended the complaint to be made within a limited time.

Appeal dismissed.

Solicitors for appellant: *Simson & Co., for Curwood, Leeds.*
Solicitors for respondent: *Ridsdale, Craddock, & Ridsdale.*

Feb. 17.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

ST. HELENS CHEMICAL COMPANY, APPELLANTS; THE CORPORATION OF ST. HELENS, RESPONDENTS.

Nuisances Removal Act for England (18 & 19 *Vict. c.* 121) *ss.* 8, 12—"*Nuisance*"—"*Drain*"—*Public Sewer—Complaint by joint Wrong-doer.*

By 18 & 19 Vict. c. 121, s. 8, "the word 'nuisances' under this Act shall include any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, so foul as to be a nuisance or injurious to health."

By s. 12, when a nuisance had been ascertained to exist, the local authority could summon before justices "the person by whose act, default, permission, or sufferance, the nuisance arises or continues," and if it was proved to the satisfaction of the justices that the nuisance existed, they should make an order in writing for the abatement or discontinuance of such nuisance.

By a local Act the respondents were bound to flush, cleanse, and trap the sewers in the town of H.

The appellants were possessed of chemical works at H., and were entitled to discharge refuse by two separate drains into a public sewer. By the one drain liquid impregnated with muriatic acid was discharged, and by the other liquid impregnated with sulphur. Upon their combination in the sewer sulphuretted hydrogen gas was produced, which escaped in sufficient quantities to be injurious to the public health. No nuisance existed in the appellants' drains. The respondents had not properly flushed, cleansed, and trapped the sewer.

Complaint having been made by the respondents of the escape of the sulphuretted hydrogen gas, an order for the abatement thereof was made by justices upon the appellants:—

Held, that the escape of sulphuretted hydrogen gas from the sewer was a

nuisance within the meaning of 18 & 19 Vict. c. 121, s. 8, that it arose from the act of the appellants, and that the respondents could lawfully make complaint thereof, although they themselves might have contributed to the existence of the nuisance.

CASE stated by justices for the county of Lancaster, under 20 & 21 Vict. c. 43.

A complaint was preferred on behalf of the respondents, who were the local sanitary authority of the borough of St. Helens, under s. 12 of the Nuisances Removal Act for England, 1855 (1),

(1) By the interpretation clause, s. 2, of the Public Health Act, 1848 (11 & 12 Vict. c. 63), "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed; the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies."

By the interpretation clause s. 2 of the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), "the word 'premises' extends to all messuages, lands, or tenements, whether open or inclosed, whether built on or not, and whether public or private; . . . . the word 'person' and words applying to any person or individual, apply to and include corporations, whether aggregate or sole."

The interpretation clause of the Public Health Act, 1848, is not incorporated.

Sect. 8: "The word 'nuisances' under this Act shall include any premises in such a state as to be a nuisance or injurious to health; any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, so foul as to be a nuisance or injurious to health."

Sect. 11: "The local authority shall have the power of entry for the following purposes of this Act . . . . (1.) To ground proceedings . . . . (2.) To examine premises where nuisances exist, to ascertain the course of drains, and to execute or inspect works ordered by justices to be done under this Act . . . . (3.) To remove or abate a nuisance in case of non-compliance with or infringement of the order of justices, or to inspect or examine any carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, or flour, under the powers and for the purposes of this Act."

Sect. 12: "In any case where a nuisance is so ascertained by the local authority to exist . . . . they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists . . . . the justices shall make an

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charging that "in or upon a certain street there called Old Atlas Street, in their district, under the Nuisances Removal Act for England, 1855, the following nuisance exists, namely, a drain so foul as to be a nuisance and injurious to health, and that such nuisance is caused by the act or default of" the appellants.

At the hearing of the complaint, on the 25th of January, 1875, it was proved that the drain in Old Atlas Street referred to was a

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order in writing under their hands and seals on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned."

Sect. 22: "Whenever any ditch, gutter, drain, or watercouse used or partly used for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises is a nuisance within the meaning of this Act, and cannot, in the opinion of the local authority, be rendered innocuous without the laying down of a sewer, or of some other structure along the same or part thereof, or instead thereof, such local authority shall and they are hereby required to lay down such sewer or other structure, and to keep the same in good and serviceable repair, and they are hereby declared to have the same powers as to entering lands for the purposes thereof, and to be entitled to recover the same penalties in case of interference, as are contained in the sixty-seventh and sixty-eighth sections of the Act passed in the fifth and sixth years of the reign of King William the Fourth, intituled 'An Act for Consolidating and Amending the Laws relating to Highways in England,' and such local authority are hereby authorized and empowered to assess every house, building, or premises, then or at any time thereafter using for the purposes aforesaid the said ditch, gutter, drain, watercourse, sewer, or other structure, to such payment, either immediate or annual, or distributed over a term of years, as they shall think just and reasonable."

By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 8, "any owner or occupier of premises within the district of a sewer authority shall be entitled to cause his drains to empty into the sewers of that authority" on condition of complying with the regulations of the authority in reference thereto.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, the statutes above-mentioned are, with certain exceptions, repealed; but similar provisions are contained in the sections commencing at 91.

By the St. Helens Improvement Act, 1869 (32 & 33 Vict. c. cxx.) s. 149, "all existing and future public sewers and drains within the borough, and all existing and future sewers and drains in and under the streets and courts, with all the works and materials thereunto belonging, whether made or provided at the cost of the corporation or otherwise, and the entire management of the same, with the appurtenances, shall vest in and belong to the corporation, and the corporation shall maintain, cleanse, and flush the same."

Sect. 163: "All sewers and drains, whether public or private, shall be provided by the corporation or other persons to whom they severally belong with proper traps or other coverings or means of ventilation so as to prevent stench."

public sewer passing into Old Atlas Street, and forming part of the drainage system of St. Helens; that sulphuretted hydrogen gas was generated in the sewer in Old Atlas Street below the appellants' works, and escaped into the street in such quantities as to be a nuisance and injurious to the health of persons passing along, and also to the inhabitants of the adjacent houses. It was also proved that there were two culverts, or barrel drains, leading from the chemical works, of which the appellants were owners and occupiers, which were both connected with the public sewer in Old Atlas Street at points some yards from each other, and it was not disputed that the culverts, or barrel drains, were properly connected with the sewer, and that the appellants had a perfect right to drain into the sewer from their premises. It was also proved that from the uppermost one of such drains liquid impregnated with muriatic acid, and from the other liquid impregnated with sulphur, were respectively discharged by the appellants from their works into the sewer in Old Atlas Street; that the liquids combined with each other and mingled with the ordinary drainage in the sewer; that the combination of the liquids so impregnated and discharged as aforesaid produced sulphuretted hydrogen gas, the production and escape of which formed the cause of complaint. It was also proved that the contents of the sewer immediately above the point of entry of the appellants' uppermost culvert, or barrel drain, was ordinary sewage matter, in which was no acid or sulphur. Evidence was given on the one side and denied on the other, that water impregnated with sulphur from other land than the appellants', namely, from land belonging to the respondents, ran into the sewer at about the point where the appellants' lower drain entered it; but the justices found as a fact that the nuisance arose from the act or default of the appellants.

The sewer in Old Atlas Street was an existing sewer at the time of passing the St. Helens Improvement Act, 1869.

No nuisance was proved to exist in either of the appellants' drains.

There was also evidence that the sewer in question, in which the alleged nuisance was said to exist, had never been flushed, nor had any other measure been adopted for the purpose of from time to time cleansing the sewer.

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There was also evidence, that but for the defective construction or trapping of the sewer no gas could escape from it, either into the street or into the adjoining houses.

The appellants contended, as matter of law: 1. That the word "drain," in s. 8 of the Nuisances Removal Act, 1855, did not mean a sewer such as that in Old Atlas Street; 2. That the alleged nuisance was not such a nuisance as was contemplated by the Nuisances Removal Act, inasmuch as it was generated and arose (if it did arise from the matter discharged from their drains) after it had been discharged into the sewer, which was by law the proper place for it to be discharged into, and into which they had, under the Sanitary Acts, a right, and were, in fact, bound to discharge it; 3. That the appellants, in getting rid of their drainage matter by so discharging it, fulfilled their obligations, and were not answerable for the state of the public sewer arising from the chemical action of such drainage matter; but that the respondents, as the local sanitary and sewer authority, were responsible for the state of the public sewers, and it was their duty as such authority, and especially under the St. Helens Improvement Act, s. 149, which required them to flush the sewers, to prevent, by trapping or otherwise, the escape of the sewer gas into the outer air.

The respondents, on the other hand, contended that the nuisance was clearly one within the scope of the Nuisances Removal Acts; that the fact of the matter discharged by the appellants' drains being a product of manufacture distinguished it in respect of the appellants' liability from ordinary drainage or sewage matter, that is, house drainage; and that the appellants had no right under the Sanitary Acts or otherwise to discharge it into the street sewer.

The justices convicted the appellants, and ordered them to abate the nuisance within twenty-one days.

The questions submitted for the Court were: 1. Was the nuisance complained of and found by the justices to exist in fact a nuisance within the meaning of the Nuisances Removal Acts? 2. Whether, on the facts stated, the order for abatement was properly made upon the appellants.

R. E. Webster, for the appellants. The decision of the justices

was wrong. The appellants had a right to drain into the sewer, and they cannot be liable for what happened after the liquids complained of were no longer under their control. As no nuisance was proved to exist in the appellants' drains, they are not the persons by whose default the nuisance has arisen: the respondents caused the mischief by omitting to cleanse, flush, and trap the sewer according to the requirements of the St. Helens Improvement Act, 1869. Further, the sewer is not a "drain" within 18 & 19 Vict. c. 121, s. 8, for that word must be understood according to the meaning assigned to it in 11 & 12 Vict. c. 63, s. 2. It is submitted, therefore, that the appellants have committed no offence against the law; but if the Court is of opinion that the nuisance was in part caused by them, it is to be inferred from the statements in the case that the respondents are the really guilty parties, and have brought about the mischief by the neglect of duty already mentioned; and as they are the complainants, the present proceedings cannot be sustained.

Manisty, Q.C. (*W. C. Gully* with him), for the respondents. The decision of the justices was right. *Brown* v. *Bussell* (1) and *Francomb* v. *Freeman* (2) greatly resemble the present case, and are strong authorities for the respondents. Arguments similar to those now relied upon were urged in these cases, and overruled by the Court of Queen's Bench. Upon the facts stated, the appellants were guilty of creating the nuisance, although there was evidence before the justices that the respondents might have done more to prevent its occurrence. The order for abatement was therefore rightly made.

R. E. Webster replied.

GROVE, J. In my opinion the decision of the justices was right, and must be affirmed. It has been contended before us that, as the appellants have a right to drain into the sewer, they may lawfully send into it liquids innocuous when kept separate, although upon combination they may create a nuisance: for the appellants are liable only in respect of what happens in their own drains. It would be a singular result of the legislation as to the removal of nuisances, if the appellants could send from their works

(1) Law Rep. 3 Q. B. 251. (2) Law Rep. 3 Q. B. 251.

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matter which, upon reaching a public sewer, is dangerous to the health of the inhabitants of the borough. I certainly think that the appellants are persons "by whose act, default, permission, or sufferance the nuisance arises" within the meaning of 18 & 19 Vict. c. 121, s. 12. The escape of a noxious gas like sulphuretted hydrogen is clearly a nuisance in ordinary language; but it is said that the meaning of the word is limited by the 8th section of the statute which I have mentioned, and that the sewer where the liquids combine is not a "drain" within its provisions; for by the interpretation clause of the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 2), the word merely means a drain from one building, and therefore cannot be applied to such a sewer as that mentioned in the present case: but the Public Health Act, 1848, is not incorporated with the Nuisances Removal Act, 1855, and the interpretation clause in the earlier Act is not of general application; it governs only the statute in which it is contained. The word "sewer" is mentioned in the 22nd section of the later Act, but it does not seem there to bear the limited meaning contended for by the appellants, and the effect of this section is that the local authority shall have power to remedy the defective drainage from a building. If the appellants were right, it would follow that no sewer within the Public Health Act, 1848, however offensive it might be, could be a nuisance within 18 & 19 Vict. c. 121. This is a construction which was, in my judgment, certainly not intended by the legislature. Then it was contended that the respondents might have prevented the escape of the gas by properly flushing and trapping the sewer, and consequently that the appellants were not liable to the present proceedings. But at all events the appellants assisted in creating a nuisance; and if two persons take part in committing a misdemeanour, each is liable to the penalty inflicted by the law; and it is no objection to a criminal proceeding, which from its very nature relates to an offence against the public, that it is instituted by a person who aided in its perpetration: therefore, if we take the statements in the case most strongly in the appellants' favour, they were in law clearly guilty of creating a nuisance, although the respondents might have done something to prevent it.

Brown v. *Bussell* (1) is not wholly in point, for there the offen-

(1) Law Rep. 3 Q. B. 251.

sive matter was in itself a nuisance at the time of quitting the appellant's premises; but so far as it goes, it supports our decision.

QUAIN, J. I am of the same opinion. The Nuisances Removal Act, 1855, confers wide powers: I need only cite the 11th section, which gives authority to enter premises in order to carry out the provisions of the Act. It has been argued that the appellants are not the persons by whose default the nuisance has arisen; but this seems to me to be one of those cases, which the statute was intended to meet: the appellants discharge into the sewer matter which necessarily becomes noxious: they are the parties causing the nuisance, for they contribute the materials out of which it springs. It has been further objected, that there is no nuisance until the liquids flowing from the appellants' chemical works reach the public sewer. I do not think that this circumstance causes any difference in the application of the law. The sewer seems to be within 18 & 19 Vict. c. 121, s. 8; it is a "drain," and may be called a "watercourse" or even "premises" as defined by the interpretation clause, s. 2. Then it is contended that the only remedy for any nuisance occasioned by the appellants is by the respondents flushing and trapping the sewer under the provisions of the St. Helens Improvement Act, 1869. I cannot assent to this argument. The circumstance that the respondents ought to take steps to prevent a nuisance does not justify the appellants in creating it.

Judgment for the respondents.

Solicitors for appellants: *Maples, Teesdale, & Co.*

Solicitors for respondents: *Gregory, Rowcliffes, & Rawle, for Swift, St. Helens.*

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THE ATTORNEY GENERAL *v.* CHARLTON AND OTHERS.

Succession Duty—Predecessor—Power of Appointment—Succession Duty Act, 1853, ss. 2, 4.

That part of s. 4 of the Succession Duty Act, 1853, which relates to making an appointment under a general power, does not apply to a case where the power can only be exercised during the life of the person whose death causes the succession.

S., tenant for life in possession, and W., his eldest son, tenant in tail male in remainder of estates, by deed dated the 22nd of March, 1854, barred the entail, and settled the estates to such uses as they should jointly appoint. By deed, dated the 23rd of March, 1854, in exercise of that joint power, they appointed the estates (in the event which happened) to the use that W. should, during the joint lives of himself and S., receive a yearly rent-charge, and subject thereto to S. for life with remainder to W. for life, with remainder to the first and other sons of W. in tail male, with remainder to such uses as S. and his second son T., should jointly appoint. W. died a bachelor, in 1864. By deed in 1866, S. and T., in exercise of the above joint power, appointed the estates (subject to S.'s life estate and in the events which happened) to the use that after the decease of S., A., his wife, should, if she should survive him, receive a yearly rent-charge of 1700*l.*, and subject thereto, that the estates should go to the use of D., the daughter of T., during so much of a certain period as she should live. S. died in 1873, leaving A. his survivor; and D., who was unborn on the 23rd of March, 1854, and was still an infant, came into possession of the estates :—

Held, that, for the purpose of assessing the duties payable respectively by A. and D., their successions were derived, within the meaning of s. 2 of the Succession Duty Act, 1853, from S. and T., as joint "predecessors," the donees of the general power of appointment; and not from W., the donor of the power.

The Crown having thereupon contended that since the joint power limited to S. and T., on the death of W., and failure of his issue male, was exercised by S. and T. by the deed of 1866, the case fell within s. 4, and S. and T. must be deemed to have been entitled jointly at the time of exercising the power to the property thereby appointed as a succession derived from W., the donor of the power; and that an additional duty attached thereon, which must be calculated as to one moiety upon the relationship of S. to W., and on the other moiety upon the relationship of T. to W. :—

Held, that the case did not fall within s. 4, the power being one which, from its nature, could only be exercised during the life of S., the person whose death caused the succession, and that no additional duty was payable.

Lord Braybrooke v. *Attorney General* (9 H. L. C. 150; 31 L. J. (Ex.) 177); and *Attorney General* v. *Floyer* (9 H. L. C. 477; 31 L. J. (Ex.) 404), distinguished.

Revd on appeal 2 Ex D 391 Affd 4 App Ca 427

THIS information was filed against the defendants, Anne Charlton, Dora Rhoda Meyrick, and Thomas Meyrick, and prayed that they might be decreed to pay succession duty at certain rates.

(1876) 7 Jur N S 741.

(1876) 9 Jur N S 1.

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The facts and deeds are sufficiently set out in the judgment.

The case was first argued on the 9th of June, 1875, before Bramwell and Cleasby, BB., and Brett, J., by

Sir J. Holker (*A.G.*), and *W. W. Karslake*, for the Crown, and by *Manisty*, *Q.C.*, *G. S. Law* (*Spencer Butler* with them), for the defendants.

After taking time for consideration, the Court desired that the case might be re-argued. Accordingly it was re-argued on the 27th and 28th of January, 1876, by the same counsel for the Crown, and by *Manisty*, *Q.C.*, and *Bevir* (with them *Spencer Butler*), for the defendants. The following authorities were referred to: *Lord Braybrooke* v. *Attorney General* (1); *Attorney General* v. *Floyer* (2); *Attorney General* v. *Drake* (3); *Attorney General* v. *Upton* (4); *Attorney General* v. *Cecil* (5); *In re Barker* (6); *In re Lovelace* (7); *Attorney General* v. *Sibthorpe* (8); *In re Peyton* (9); *Attorney General* v. *Littledale* (10); *In re Ramsay's Settlement* (11); *In re Chapman's Trusts.* (12)

Cur. adv. vult.

Feb. 29. The judgment of the Court (Kelly, C.B., Amphlett and Huddleston, BB.), was read by

AMPHLETT, B. The judgment I am about to deliver is the judgment of the Court.

This information has been filed for the purpose of settling the rate of succession duty which became payable in respect of certain estates in Shropshire, on the death of St. John Chiverton Charlton, hereinafter called St. John Charlton, the late tenant for life.

At the date of the disentailing deed of the 22nd of March, 1854, hereinafter mentioned, St. John Charlton was under the limita-

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.
(2) 9 H. L. C. 477; 31 L. J. (Ex.) 404.
(3) 10 Cl. & F. 257.
(4) Law Rep. 1 Ex. 224.
(5) Law Rep. 5 Ex. 263.
(6) 7 H. & N. 109; 30 L. J. (Ex.) 404.
(7) 4 De G. & J. 340; 28 L. J. (Ch.) 489.
(8) 3 H. & N. 424; 28 L. J. (Ex.) 9.
(9) 7 H. & N. 265; 31 L. J. (Ex.) 50.
(10) Law Rep. 5 H. L. 290.
(11) 30 Beav. 75; 30 L. J. (Ch.) 849.
(12) 2 H. & M. 447.

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tions of a settlement dated the 22nd of August, 1820, tenant for life in possession, and St. John William Chiverton Charlton, since deceased, hereinafter called William Charlton, his eldest son, was the first tenant in tail male of these estates. At this time the estates were subject to various incumbrances, the particulars of which need not be stated, and to a jointure rent-charge of 800*l.* a year limited to the defendant Anne Charlton, the second wife and now the widow of St. John Charlton, in case she should survive him.

By the disentailing deed dated the 22nd of March, 1854, and made between St. John Charlton of the first part, his eldest son William of the second part, and trustees of the third part, the said estates were disentailed, and the bulk thereof were limited (subject to incumbrances and to the jointure rent-charge of 800*l.* to the defendant Anne Charlton) to such uses as St. John Charlton and William Charlton should jointly appoint, and in default, to the use of St. John Charlton for life, with remainder to William Charlton in tail male, with remainder to St John Charlton in fee.

By an indenture dated the 23rd of March, 1854, and made between St. John Charlton of the first part, William Charlton of the second part, and the said trustees of the third part, St. John Charlton and William Charlton, in exercise of the joint power given to them by the last-mentioned indenture, appointed the said estates (subject to incumbrances as therein mentioned) to such uses as they should jointly appoint, and in default thereof, to the use that William Charlton should during the joint lives of himself and St. John Charlton, receive a yearly rent-charge of 800*l.*, and subject thereto to St. John Charlton for life, with remainder to William Charlton for life, with remainder to the first and other sons of William Charlton in tail male, with remainder to such uses as St. John Charlton and the defendant Thomas Meyrick (therein called Thomas Charlton the second son of St. John Charlton), after he should have attained twenty-one, should jointly appoint, and in default to Thomas Meyrick for life, with remainder to his first and other sons in tail male, with divers remainders over.

Thomas Meyrick attained twenty-one in 1858, and thereupon assumed the name of Meyrick, instead of Charlton.

William Charlton died a bachelor on the 30th of October, 1864;

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and he and his father, St. John Charlton, never exercised the joint power of appointment given to them by the indenture of the 23rd of March, 1854.

By an indenture dated the 16th of February, 1866, and made between St. John Charlton of the first part, Thomas Meyrick of the second part, and trustees of the third part (after reciting certain dealings with the estates and the incumbrances thereon not necessary to be here stated), St. John Charlton and Thomas Meyrick, in exercise of the joint power limited to them by the said indenture of the 23rd of March, 1854, appointed the said estates (subject to the aforesaid life estate of St. John Charlton) to such uses as St. John Charlton and Thomas Meyrick should jointly appoint; and in default to the use that the defendant Anne Charlton, in case she should survive St. John Charlton, should, after his decease, receive a yearly rent-charge of 1700*l.* in addition to the said jointure rent-charge of 800*l.* hereinbefore mentioned; and subject thereto to the use that Mary Rhoda Meyrick, the wife of Thomas Meyrick, should in certain events, which have not yet happened, receive a yearly rent-charge of 1000*l.*; and subject to the said rent-charges, and after the decease of St. John Charlton—in the case which happened of a certain estate in tail male of another estate given by the will of the grandfather of Thomas Meyrick to his first and other sons being then subsisting—then and until the same estate in tail male should be barred either in the life times of Thomas Meyrick and his eldest son Frederick Charlton Meyrick or the survivor, or within twenty-one years after the death of the survivor of them and St. John Charlton, or the same estate in tail male should, within the same period cease, then during the continuance of "the same period" (1) to the uses following—that is to say, during so much of "the same period" as the defendant Dora Rhoda Meyrick (then the only daughter of Thomas Meyrick, and hereinafter called Dora Meyrick), or any son or daughter of her, or any other daughter or daughters of Thomas Meyrick, or any son or daughter of any such last-mentioned daughter or daughters, should from time to time be living, the same estates were to go to the use of

(1) "The same period" was by the indenture defined to be the period during which the happening of such one of the aforesaid several events as should first happen should be in suspense.

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Dora Meyrick and her assigns, during so much of "the same period" as she should live, with remainder to the use of her first and other sons successively, during so much of the same period as each son should live, with remainder to the use of her first and other daughters successively, during so much of such period as each daughter should live, with divers remainders over during "the same period." (1)

The precise ages of Dora Meyrick, who is still an infant, and her brother Frederick Charlton Meyrick, in the last indenture named, are not stated, but it is clear that neither of them were living at the date of the settlement of the 23rd of March, 1854, and this circumstance will appear hereafter to be not immaterial.

St. John Charlton and Thomas Meyrick never exercised the joint power of appointment limited to them by the settlement of the 16th of February, 1866.

St. John Charlton died on the 23rd of February, 1873, and Thomas Meyrick is his executor; and it was agreed before us that Thomas Meyrick should be considered as a party to the suit in the character of executor of St. John Charlton as well as in his own right.

Under these circumstances, it was contended before us by the Attorney General, on the part of the Crown, that the succession duty payable on the death of St. John Charlton was at the rate of 1 per cent. from the defendant Anne Charlton in respect of her yearly rent-charge of 1700*l.*, and 3 per cent. in respect of the life interest of Dora Meyrick, the same being taken in each case as a succession derived from William Charlton (2), the donor of the joint power created by the settlement of the 23rd of March, 1854, which was exercised by the settlement of the 16th of February, 1866. Whereas it was contended on behalf of the defendants Anne

(1) It appeared from the information and answer that at the time when they were filed, in 1875, Frederick Charlton Meyrick and Dora Meyrick were still infants, and that Dora Meyrick was entitled in possession to the estates during so much of "the same period" (defined by the last indenture) as she should live, the estate tail given by the will of Thomas Meyrick, grandfather of the defendant Thomas Meyrick, being still subsisting and not having been barred.

(2) Anne Charlton being the wife of William Charlton's father, and Dora Meyrick being the daughter of William Charlton's brother. See ss. 10 and 11 of the Succession Duty Act, 1853, for rates of duty.

Charlton and Dora Meyrick that the rate in each case ought to be taken as on a succession derived from St. John Charlton and Thomas Meyrick (the donees of the power), which would make the rate 1 per cent. in respect of a moiety only of the rent-charge (1), and 1 per cent. in respect of the entire life estate of Dora Meyrick, and the succession duty after the last-mentioned rates the defendants had offered to pay before the filing of this information.

It was further contended by the Attorney General, that if the Court should hold the defendants Anne Charlton and Dora Meyrick right in their contention, he should then, and then only, contend that the joint power of appointment limited to St. John Charlton and Thomas Meyrick by the settlement of the 23rd of March, 1854, was a general power of appointment within the meaning of the 4th section of the Succession Act of 1853, and that, having exercised that power (2), they ought under that section to be deemed to have been entitled jointly to the property thereby appointed as a succession derived from William Charlton (3), and that duty attached thereon at the rate of 1 per cent. on the moiety of St. John Charlton, and 3 per cent. on the moiety of Thomas Meyrick, in addition to the duties payable as aforesaid by the defendants Anne Charlton and Dora Meyrick. (4)

The solution of the questions thus submitted to us depends upon the true construction of the 2nd and 4th sections of the Succession Act, and I think it will tend to clearness if I consider, first, what would be the rate of duty under the 2nd section if it stood alone, and, secondly, whether the 4th section applies to the case at all, and if so, what difference (if any) it makes in the result. (5)

(1) If St. John Charlton and Thomas Meyrick were the joint predecessors, Anne Charlton, under s. 13, would "be deemed to have derived her succession in equal proportions from each predecessor, and chargeable with duty accordingly," and would, therefore, pay no duty upon the moiety derived from her husband St. John Charlton; and Dora Meyrick would pay one per cent. as the lineal issue of both predecessors. See s. 10.

(2) By the indenture of the 16th of February, 1866.

(3) As donor of the power.

(4) The Attorney General contended that these duties were payable by the defendant Thomas Meyrick, in respect of the one per cent. on one moiety, as the executor of St. John Charlton, the lineal ancestor of William Charlton; and in respect of the three per cent. on the other moiety, in Thomas Meyrick's own right as brother of William Charlton—ss. 4, 10, 13, 20, and 21.

(5) Sect. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51): "Every past or future disposition of

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First, then, as to the 2nd section, it is clear that Anne Charlton, in respect of her jointure of 1700*l.* a year, and Dora Meyrick in respect of her life interest respectively, take a succession within the meaning of the section; and the only difficulty is to determine who ought to be considered the predecessor, upon their propinquity to whom the rates of duty depend. The section says that the term "predecessor" shall denote the settlor, &c., or other person from whom the interest of the successor is or shall be derived; and we are told, on high authority (1), that "this statute, which by the same enactments imposes a tax on succession in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed."

2 Ch D. 420

No one, I think, can doubt that, in a popular sense, and according to the ordinary notions of mankind, the interest of these defendants

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property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 4: "Where any person shall have a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition, taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor."

(1) Per Lord Campbell in *Lord Braybrooke* v. *Attorney General*, 9 H. L. C. at p. 165; 31 L. J. (Ex.) at p. 181: citing *Lord Saltoun* v. *Advocate General*, 3 Macq. 659. 6 Jur. N.S. 713

(4 S.P. Jur. N.S. 742)

would be considered as derived from the makers of the settlement of 1866, who had in themselves, without the control of any other person, full and entire dominion over the estates. It never could have occurred to any one, not versed in the technicalities of English law, that we were to look back through the title for the predecessor until we came to some person or other out of whose estate, as contradistinguished from power, the interest of the successor was derived.

Observe too that it is theoretically possible that you might have to travel back for centuries before you could find such a predecessor, for there is nothing contrary to law in carrying on an estate from one generation to another ad infinitum by the successive creation of general powers. Of course no one would seriously contend that you were to go back in that way through several generations to find the predecessor, but the alternative is that you must take a person with only a power as predecessor.

Suppose, again, that a father purchased an estate and took the conveyance to himself to the old uses to bar dower, and afterwards appointed to his son in fee. For many purposes, connected with covenants of title and protection against incumbrances, the son would take immediately from the vendor who created the father's power, but could it be contended that the son would be charged with 10 per cent. succession duty on the ground that the vendor, and not his father, was the predecessor from whom he derived his succession?

No doubt it is a general rule of law that the interest taken by an appointee under a power must be considered as arising under the deed creating the power, and the application of that rule will in some cases lead to the discovery of the predecessor from whom the interest of the successor, not only in form but in substance and popularly speaking, was derived, but in other cases, such as those to which I have already called attention, the rule, if applied, would defeat one of the main objects of the Succession Act, which was, to assess a comparatively low rate of duty upon those who, from their relationship to the actual settlor, might reasonably expect the benefit of the succession.

Let us look at the circumstances of the present case. St. John Charlton and his son William, by the indenture of the 22nd

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March, 1854, cut off the entail, and limited the estates to such uses as they should jointly appoint, and subject thereto to the use of St. John Charlton for life, with remainder to William Charlton in tail, with remainder to St. John Charlton in fee. This being the state of things, the father and son agree to re-settle the estate in this way: they retained the joint power of disposition over the estate, which, however, they never exercised; then William was to take a rent-charge of 800*l.* a year during his father's life, and, subject thereto, the father was to retain his estate for life. William's estate tail was cut down to an estate for life to himself, with remainder to his first and other sons in tail; and then, on William's death, and failure of such issue (which happened), the father and the second son were to have the absolute direction over the estate, so that they might dispose of it for their own benefit, or re-settle it in any way they pleased, without William Charlton having any voice in the matter whatever; and this absolute dominion over the estate was not a voluntary gift, but must, I think, be considered as purchased by the father, inasmuch as William took a rent-charge of 800*l.* out of the estate. It does appear to me that William Charlton had thus reduced himself very much to the position of the vendor, in the case I put above, of a conveyance to a purchaser to uses to bar dower, and that it would be unreasonable and contrary to the spirit and intention of the Act to consider him as the person from whom the appointees of the father and second son derive their interest. But then it was strongly urged on the part of the Crown that the case was concluded by *Lord Braybrooke* v. *Attorney General* (1), and *Attorney General* v. *Floyer* (2), and as these decisions so far, if at all, as they are applicable to this case, are absolutely binding upon this Court, they will require close examination.

Lord Braybrooke's Case (1), so far as respects the question we are considering, was this: In 1841 Richard, the third Lord Braybrooke, and his eldest son, Richard Cornwallis Griffin, being then respectively tenant for life in possession and tenant in tail in remainder of the Audley End estate, executed a disentailing deed, and limited the estate (subject to the life estate of Lord Bray-

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177. 7 Jur. N.S. 741

(2) 9 H. L. C. 477; 31 L. J. (Ex.) 404. 9 Jur. N.S. 1

brooke) to such uses as Lord Braybrooke and his said son should jointly appoint, and in default to such uses as the son should, if he survived, appoint, and in default to the son for life, with remainder to his first and other sons in tail male. In 1850 Lord Braybrooke and the son executed another deed in exercise of their joint power, by which the son gave up certain advantages to which he was entitled, and an annuity to the son during the life of his father was charged upon the estate, and subject thereto the estate was limited to the same uses as had been declared by the deed of 1841. Lord Braybrooke died in 1858, and, in order to ascertain the rate of duty payable by the son on his succession, it became necessary to ascertain who was his predecessor, and it was held that the two deeds, though executed at an interval of nine years, might be treated as constituting one disposition, that the father was not either solely or jointly a predecessor, and that the son was his own predecessor.

Again, *Floyer's Case* (1) was this: Under the will of Henry Bankes (the father) certain estates stood limited to his eldest son Henry Bankes for life, with remainder to his first and other sons in tail. In June, 1810, Henry Bankes, and his eldest son William John Bankes, being respectively tenants for life in possession, and tenant in tail in remainder, joined in a common recovery for barring the entail, and limited the estates to such uses as Henry Bankes and William John Bankes should jointly appoint; and in default to Henry for life, with remainder to such uses as William John, if he survived his father, should appoint, and in default to the uses of the will of Henry the father. In 1821 Henry and his son William John, in exercise of their joint power of appointment, limited the estates to such uses as Henry and William John should appoint, and in default to Henry for life, with remainder to William John for life, with remainder to the first and other sons of William John in tail male, with remainder to George and the other brothers of William John successively. Henry died in 1834, and William John died unmarried in 1855, whereupon George Bankes, the next brother, came into possession. There were subsequent dealings with the estates which gave rise to questions which need not be here considered, but in order to ascertain the rate of

(1) 9 H. L. C. 477; 31 L. J. (Ex.) 404.

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duty payable by George Bankes it became necessary to ascertain who was his predecessor, and it was held, following *Braybrooke's Case* (1), that his brother William John was his sole predecessor, and that his father Henry was neither sole nor joint predecessor.

Now these cases decide only that, although the father was a joint appointor with his son, still the parties taking under the appointment were considered as deriving their interest for the purposes of the Act exclusively from the son, because the father having retained his life estate contributed nothing, and, as Lord Campbell expressed it (2), the joint power reserved to the father and son was not intended as a matter of pecuniary value to the father, but only as a check upon the son that he might not, during the father's lifetime, make any imprudent disposition of the family property.

To make these cases like the present one, we must suppose that the father and son had appointed after the death and failure of issue of the son to such uses as the father and a younger brother, or it might be as a stranger, should appoint; and I can see nothing in the reasoning of the noble lords who decided those cases that induces me to think that they would have held the son to be the predecessor of the appointees, whoever they might be, under the last-mentioned power. It is true that both Lord Kingsdown (3) and Lord Cranworth (4) refer to the general rule of law I have mentioned, that the interest created by a power is to be treated as arising from the deed creating the power; but Lord Kingsdown was apparently unwilling to rest his judgment on that somewhat technical ground, and I see no reason to believe that either of them intended to adopt that rule as a test in all cases for ascertaining the predecessor under the Act. Moreover, this rule itself is subject to an important exception, viz. where the limitations created by the exercise of the power are such that if inserted in the deed creating the power they would be void for remoteness. In that case it was formerly doubted whether by a close application to the rule in question the limitations so created

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

(2) *Lord Braybrooke* v. *Attorney General*, 9 H. L. C. at p. 167; 31 L. J. (N.S.) Ex. at p. 182.

(3) 9 H. L. C. 182; 31 L. J. (Ex.) 189.

(4) 9 H. L. C. 491; 31 L. J. (Ex.) 411.

would not be void, but it was ultimately held that they would not, because a general power being equivalent to the fee, the same estates might be created by either, and that to take a distinction between a general power and a limitation in fee would be "to grasp at a shadow, whilst the substance escapes": see 1 Sugden on Powers, 6th ed. p. 497; and 8th ed. p. 396.

And this very exception to the universality of the rule arises here, for, as I have observed before, Dora Meyrick was not living at the date of the settlement of the 23rd of March, 1854, and consequently the successive limitations for life to her and her issue, if carried back into the settlement of the 23rd of March, 1854, would have been void for remoteness, and the rule contended for therefore is not applicable. Nor is this objection cured by the fact that these successive life estates to Dora Meyrick and her issue were only to last during the period in the settlement of 1866 mentioned, because that period might have lasted for twenty-one years after the death of Dora's brother Frederick Charlton Meyrick, who, like herself, was unborn at the date of the settlement of 1854.

For these reasons I am of opinion that under the 2nd section taken alone, St. John Charlton and Thomas Meyrick must be considered as the predecessors from whom the defendants Anne Charlton and Dora Meyrick derived their interest under the settlement of 1866.

But then, secondly, we have to consider whether this result is affected by the 4th section of the Act, which, so far as relates to general powers, is as follows: "Where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power."

There has been some difference of opinion as to the cases to which this section applies. Lord Hatherley, when Vice-Chancellor, decided in *Lovelace's Case* (1) that the words "taking

(1) 4 De G. & J. 340; 28 L. J. (Ch.) 489, 492.

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effect upon the death," &c., ought to be read in connection with the immediate antecedent "any disposition of property," and, that consequently the section did not apply to any disposition which had been made to take effect before the passing of the Act. This decision, however, was reversed by the Lords Justices, and upon the ground, as stated by Lord Justice Turner (1), that the words "taking effect upon the death," &c., must be taken to refer not to "any disposition of property," but to the "power of appointment;" and according to that view, which appears to me the correct one, the section cannot embrace a case like the present, where the power can, from its nature, only be exercised during the life of the person whose death causes the succession. In the latter case, indeed, no special provision is wanted, because the appointees under a power which must be exercised, if at all during the life, would clearly fall within the 2nd section; whereas, in the case of a power of appointment taking effect that is capable of being exercised after the death no succession duty would be payable under the 2nd section by subsequent appointees, since they would not become entitled upon the death, and it was for that reason necessary to make a special provision to meet the case.

I am of opinion, therefore, that the present case does not fall within the 4th section at all. If, however, contrary to my opinion, the 4th section does apply, then the case of *Attorney General* v. *Upton* (2) is a direct authority for considering St. John Charlton and Thomas Meyrick the predecessors, and, therefore, if that case was rightly decided, the result is the same to the defendants Anne Charlton and Dora Meyrick as if the case fell within the 2nd section only. Nor am I convinced that the Crown can in any case be entitled to a double duty as contended for by the Attorney General. The point has been several times mooted, but no Attorney General has ever yet, so far as I know, taken the opinion of the Court upon it, and Lord Justice Turner, in *Lovelace's Case* (3), where it came before him incidentally, expressed an opinion against it. However, I prefer to rest my judgment on the ground that the 4th section has no application, and I do not

1) 4 De G. & J. at p. 351; 28 L. J. (Ch.) at p. 497.

(2) Law Rep. 1 Ex. 224.

(3) 4 De G. & J. at p. 350; 28 L. J. (Ch.) at p. 496.

find it necessary therefore to express any decided opinion on this subject of double duty.

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For these reasons I am of opinion that the Crown is only entitled to succession duties on the footing of St. John Charlton and Thomas Meyrick being the predecessors, and, as those duties were offered to be paid by the defendants before the information was filed, they are entitled to the costs of the suit.

Judgment accordingly.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Law, Hussey, & Hulbert.*

COHEN *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Jan. 21.

Railway Company—Carriers by Steamer—Passengers' Luggage—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 16.

Sect. 7 of the Railway and Canal Traffic Act, 1854, which regulates the liabilities of railway companies as to "any articles, goods, or things in the receiving, forwarding, or delivering thereof," applies to passengers' luggage; so that a condition made by a railway company limiting their liability in respect of passengers' luggage is not binding unless such condition is reasonable, and is contained in a contract signed by the passenger. That section is incorporated by s. 16 of the Regulation of Railways Act, 1868, so as to extend its provisions to traffic carried on by steam vessels owned or used by railway companies.

DECLARATION that the defendants were carriers of passengers and their luggage by sea from Boulogne, in the republic of France, to Folkestone, and thence by land to London; that the plaintiff's wife became a passenger, with her luggage, which, through the negligence of the defendants, fell into the sea and was lost.

The defendants, by their fifth plea, set up that the injury did not happen whilst the luggage was being carried on the defendants' line of railway, and that the plaintiff's wife was carried under a special contract between the plaintiff's wife as agent for the plaintiff, and the defendants, and subject to certain conditions set out in a through ticket, one of which conditions was that the defendants should not be responsible for luggage if the value thereof

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exceeded 6*l.*, and that the luggage of the plaintiff's wife delivered to the defendants did exceed the value of 6*l.*

To this plea the plaintiff demurred, and also replied that, in carrying his wife and her luggage from Boulogne to Folkestone, the defendants were acting under the authority of s. 16 of the Regulation of Railways Act, 1868 (1), and that the vessel on which the plaintiff's wife was travelling was a steam-vessel, and the carrying of the plaintiff's wife and her luggage was a carrying of traffic within the meaning of that section; that the Railway and Canal Traffic Act, 1854, was applicable, and that the alleged special contract in the plea mentioned related to the receiving, forwarding, or delivering of articles, goods, or things within the meaning of the 7th section of that Act (2); and that such special

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(1) 31 & 32 Vict. c. 119, s. 16, enacts that "where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam-vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of any such steam-vessels, then, and in every such case, tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed, &c.

"The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam-vessels and to the traffic carried on thereby."

(2) 17 & 18 Vict. c. 31, s. 1, enacts that "the word traffic shall include not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company."

Sect. 7 enacts that "every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said company from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or judge before whom any question shall be tried, to be just and reasonable: . . . . Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage:

contract was not signed. He also replied that the special contract was not just or reasonable.

To these replications the defendants demurred.

Bray, for the plaintiff. The question is whether passengers' luggage is within the Railway and Canal Traffic Act, 1854, s. 7. The liability of the company with regard to the amount of passengers' luggage that they are bound to carry, and the amount they agree to carry, cannot be different. *Zunz* v. *South Eastern Ry. Co.* (1) was decided on another ground, but the Court there were evidently inclined to treat passengers' luggage as goods, and *Macrow* v. *Great Western Ry. Co.* (2) bears out that conclusion. Then the Acts 31 & 32 Vict. c. 119, s. 16, and 34 & 35 Vict. c. 78, s. 12, extend the liability of the companies to their steamboat traffic: *Moore* v. *Midland Ry. Co.* (3) The effect, therefore, is to extend the Railway and Canal Traffic Act to goods carried at sea, and if passengers' luggage comes within the term goods, then to that. Then, further, the condition means that the company will in no event incur any liability over 6*l.*, and that is unreasonable.

The expression "towns or ports" in 31 & 32 Vict. c. 119, s. 16, is perfectly general, and it is clear it was meant to include foreign as well as home ports to which the company's steamers run; in fact, the provision would be meaningless unless directed to through traffic.

Willis, for the defendants. Without disputing that railways are responsible for passengers' luggage as common carriers, the defendants' argument is that s. 7 of the Railway and Canal Traffic Act only applies to ordinary merchandise carried apart from the passenger. Otherwise the companies can only limit their liability by making each passenger sign a contract in respect of his luggage, which is practically impossible.

[BRAMWELL, B. What was intended by the Act was, that a company under the first proviso might give a general notice

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Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of 11 Geo. 4 & 1 Wm. 4, c. 68, with respect to the articles of the description mentioned in the said Act."

(1) Law Rep. 4 Q. B. 539.

(2) Law Rep. 6 Q. B. 612.

(3) Ir. Rep. 8 C. L. 232.

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limiting their liability, provided the limitation were just and reasonable, independently of any contract signed by the parties. I think it a mistake to hold (as it has been held (1)) that such a condition was intended to be void if not signed. The two forms of limiting liability were intended to be kept distinct. That is the way I should construe the Act if there were no authority the other way, and I know that that was what was intended.]

The words "receiving, forwarding, and delivering" are not applicable to passengers' luggage, for the company may have done neither of these things. In *Talley* v. *Great Western Ry. Co.* (2), where the passenger had charge of his luggage, the company were held not liable. *Stewart* v. *London and North Western Ry. Co.* (3) is a direct authority in the defendants' favour, for an excursion train cannot differ in this respect from any other train. *Moore* v. *Midland Ry. Co.* (4) seems to assume that 31 & 32 Vict. c. 119, and 34 & 35 Vict. c. 78, incorporate the 7th section of the Railway and Canal Traffic Act; but the first six and the 7th sections relate to different matters. The word "traffic" does not occur in the 7th section, and it was never intended to put railway companies carrying by sea on a different footing from any other steamboat company.

Bray, in reply.

BRAMWELL, B. The second point taken by Mr. Willis in the argument of this case was whether 31 & 32 Vict. c. 119 extends to s. 7 of the Railway and Canal Traffic Act, 1854, so as to include it. Mr. Willis says that it includes the first six sections, but not the 7th. The answer to that is, that the Act expressly says that the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam-vessels and the traffic carried on thereby. Mr. Willis wants us to read that as though it said "some of the provisions," which we cannot do; and unless there is necessarily something incongruous between the 7th section and the later Act, we ought to treat the

(1) See *Peek* v. *North Staffordshire Ry. Co.*, E. B. & E. 958, 986, and in H. L.; 32 L. J. (Q.B.) 241; 1 Sm. L. C. 7th ed. p. 235.

(2) Law Rep. 6 C. P. 44.

(3) 3 H. & C. 135; 33 L. J. (Ex.) 199.

(4) Ir. Rep. 8 C. L. 232.

former as extending to traffic on the railway company's steam-vessels, and therefore on the short ground that we ought not to limit the express words of the incorporating clause unless an absolute necessity exists, we must treat s. 7 as extending to this case.

Then the next question is, whether s. 7 applies to passengers' luggage. The section treats, among other things, of receiving, forwarding, and delivering any articles, goods, or things. Now, these are goods, passengers' goods, or luggage, and they are received, forwarded, and delivered; Mr. Willis wants us to put in certain words of exception as to passengers' luggage, but the same answer must be given as before. We ought not to put in the exception, unless there would be some absurdity or incongruity in construing the Act without such an exception, or some inconvenience so great that we are driven to suppose the exception was intended. I do not see any insuperable difficulty with regard to the signature of a contract by each passenger; while, if the Act were construed as I think it ought to have been construed, there would have been no difficulty at all. We ought, therefore, not to put in the limitation proposed. I think it very important to have it admitted, as we have by Mr. Willis' concession, that the company are insurers of passengers' luggage.

The only question that remains is how to deal with the case of *Stewart* v. *London and North Western Ry. Co.* (1) In that case it appears that it was not the ordinary case of a man paying the ordinary charge—which, as has been properly said, comprehends a charge for carrying his luggage as a common carrier—but something out of the ordinary. I do not wish to throw any doubt on that case, but it was a case of a special excursion train in which the parties made a bargain as to terms, of which the plaintiff might have informed himself if he had thought fit to do so, and I think that the only way in which that judgment can be supported is by saying that the Railway and Canal Traffic Act applies to carrying a passenger and his luggage on an ordinary journey for the ordinary remuneration, such as he would have a right to demand by going to the company and tendering his fare, in which

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199.

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case I rather think he would have a right to bring an action if they refused to carry him, and that the Act does not apply to such a case as that of the special excursion train. I think, therefore, that but for the authority of *Stewart* v. *London and North Western Ry. Co.* (1) the matter would be clear, and that case is distinguishable. The case is quite clearly within the words of the Act, and judgment must be for the plaintiff.

AMPHLETT, B. I am of the same opinion. I agree that, whatever be the construction of the 7th section of the Railway and Canal Traffic Act, it is applicable to steam-packets as to trains of the company. Then the question is whether ordinary passengers' luggage is included in the term "articles, goods or things" which are mentioned in the 7th section. It is important to have it decided whether the company are common carriers with regard to passengers' luggage. This was very properly conceded for the purpose of the argument by Mr. Willis, and indeed there is the case of *Richards* v. *London, Brighton, and South Coast Ry. Co.* (2) directly in point. The decision there was observed on in *Talley* v. *Great Western Ry. Co.* (3) by Willes, J., but the point was not really necessary for the determination of that case. Therefore, treating the company as common carriers of passengers' luggage and subject to liability as common carriers, the question is whether you can draw a distinction between goods carried by the company as luggage or as merchandize in the ordinary way. I confess I can see none. I think, on the plain construction of the statute, that luggage delivered to the company, excluding that taken charge of by the passenger himself, is within the words of the section. Then it was argued on the proviso that it is only applicable to ordinary merchandize sent in the ordinary way, but I do not agree with that contention. Then we were pressed with the argument that it would be excessively inconvenient, and indeed practically impossible, that passengers should sign a special contract. I agree that it would be so, but I do not think the argument of inconvenience ought to outweigh the clear and distinct words, and we should be

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199.
(2) 18 L. J. (C.P.) 251.
(3) Law Rep. 6 C. P. 44.

wrong in raising exceptions, which really do not exist and never were intended, upon such grounds. 1876

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HUDDLESTON, B., concurred.

Judgment for the plaintiff. (1)

Solicitor for plaintiff: *H. J. Coburn.*
Solicitor for defendants: *W. R. Stevens.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.] *Feb.* 18.

DRYDEN, APPELLANT; THE OVERSEERS OF PUTNEY, RESPONDENTS.

"New Street"—Cost of Paving—Liability of Owners of Adjoining Houses and Land—Discretion of Vestry and District Board—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 96, 98, 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

When within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the cost thereof upon the general rate under ss. 96, 98 of that Act; they are bound to charge the expense of laying the pavement upon the owners of the adjoining houses and land, under s. 105 of that statute, as varied by 25 & 26 Vict. c. 102, s. 77.

In 1855 a road in P., within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, ran between an irregular line of houses and market gardens upon the south side, and market gardens upon the north. Between that year and 1874, a continuous line of houses was built along the north side, and several houses along the south. The district board, within whose jurisdiction the road lay, in 1874, paved a footpath by the side of the road, and paid for the cost of the work under 18 & 19 Vict. c. 120, ss. 96, 98, out of the general rate levied upon the inhabitants of P.:—

Held, first, upon the authority of *Pound* v. *Plumstead Board of Works* (Law Rep. 7 Q. B. 183), that between 1855 and 1874 the road had become a "new street" within 18 & 19 Vict. c. 120, s. 105; secondly, that the district board had no power to charge the cost of paving the footpath upon the general rate, but that it was compulsory upon them to obtain payment thereof from the owners of the adjoining houses and land, under that section, as varied by 25 & 26 Vict. c. 102, s. 77.

APPEAL under 12 & 13 Vict. c. 45, s. 11, against an order of a

(1) On an application on behalf of the defendants for leave to amend the plea by stating that the contract was made in France and governed by French law, and that by that law the defendants were exempt from liability, permission was given on terms and on payment of all costs, otherwise final judgment on the demurrers was to be entered for the plaintiff.

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metropolitan police magistrate, made on the 10th of April, 1875, directing a levy to be made on the goods of the appellant for the sum of 1*s.* 6*d.* and costs, such sum of 1*s.* 6*d.* being part of a sum of 1*l.* 11*s.* 6*d.*, for which the appellant was assessed in respect of a general rate made by the respondents on the 5th of October, 1874, in pursuance of the Metropolis Local Management Act, 1855.

The facts were stated in the form of the following special case:—

1. The appellant had for some years before been and still was the occupier of a house situated in the High Street, in the parish of Putney, in the county of Surrey, at some distance from and quite separate from the Upper Richmond Road hereinafter referred to; and the distress hereinafter referred to was made in respect of part of a rate, to which the appellant was assessed in respect of his house in High Street. The appellant had never been the owner or occupier of any house or land adjoining the Upper Richmond Road.

2. The Upper Richmond Road was an old highway in the parish of Putney, and at the time of making the rate hereinafter mentioned, formed the main carriage and footway from Wandsworth and Putney to Richmond; and it had been kept in repair for the last forty years or more by rates raised from the ratepayers of Putney at large. Prior to the establishment of railways, this road was comparatively unimportant, the main traffic from Wandsworth and Putney to Richmond then passing by another road through Barnes.

3. Before and at the time of the passing of the Metropolis Local Management Act, 1855, which embraced the parish of Putney in the district of the metropolis called the Wandsworth district, the condition of that portion of this road which was in question in this case, and which extended for about 734 yards in length, and is hereinafter referred to as "the road," was as follows:—On the south side, running westward for about 300 yards, there was an irregular line of houses, some of them detached, some of them contiguous; and there were two small isolated houses along the remaining 434 yards, the rest of the road along this 434 yards being bounded by market gardens. On the north side the road, for the whole 734 yards, was bounded by market gardens except at two places, where there were two small houses or cottages.

4. Along the south side of the road there was, in 1855, a good raised gravel footpath of several feet in width, and almost all the foot traffic along the road passed along this south side. Along the north side there was, in 1855, a narrow and ill-defined foot-track between the hard carriage-way of the road and the boundary hedge, very little foot traffic passing along that side of the road, and no regularly formed footpath then existing along that side of the road.

5. Since the year 1855, the two cottages on the north side of the road had been pulled down, and the whole of the frontage land adjoining the north side of the road had been covered with a continuous line of detached and semi-detached houses, space being left at one spot for a new road running out of the old highway at right angles; and on the south side portions of the frontage along the 434 yards had also been covered with detached villas, and the rest of the frontage was on offer as building land.

6. In the course of building the houses on the north side, the old boundary hedge, which was somewhat crooked, had been removed, and a new and straight line of fence formed by the entrance gates and railings or palisades to the new houses, strips of land being here and there thrown into the highway so as to straighten the fence and afford room for a spacious footpath on that side of the road, the width of the carriage-way being at some places slightly decreased and at others slightly increased.

7. At intervals from 1864 to 1870, the Wandsworth District Board of Works fixed a granite kerb along the footpath on the north side of the road, and made up the path with gravel over the whole width of the path from this kerb to the line of fence of the new houses.

8. This kerb, and the making up of the path, were paid for by the said district board out of the "general rates" of the parish. Since then the footpath had been from time to time repaired by the district board and used as part of the highway of the Upper Richmond Road.

9. The ordinary repairs of all the highways in the parish had, since 1855, been paid for by the district board out of the "general rates;" those general rates being usually made half yearly, and assessed upon all the ratepayers of the parish at large.

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10. In the year 1874 the line of new houses on the north side of the road was approaching completion, and the district board thereupon took into consideration the propriety of paving the footpath on that side of the road; and, in accordance with a resolution of the district board, the footway on the north side of the road was paved by the district board with Val de Travers asphalte, laid on a bed of Portland cement concrete, and the cost of this paving was included in the general rate.

11. Prior to the execution of the paving, the appellant, having in the month of June, 1874, heard that the district board contemplated paving the footway in question and paying for it out of the general rate for Putney, urged upon the district board that, under the circumstances, the road had become a new street within the meaning of the Metropolis Local Management Act, 1855, and the Metropolis Local Management Amendment Act, 1862, and that under those Acts the cost of paving the footpath of the road ought to be borne not by the ratepayers of Putney at large, out of the general rate, but by the owners of the houses and land abutting on the footpath in question.

12. The district board, however, refused to accede to the appellant's suggestion, contending that the road was not a new street within the meaning of those Acts.

13. The appellant refused to pay the sum of 1*s.* 6*d.*, being part of the amount at which he was assessed to the general rate, on the ground that the said sum represented the proportion charged for the paving of the footway, an expense improperly included in the general rate; and in consequence of such refusal the sum of 10*s.* 4*d.* was levied on the goods of the appellant by virtue of the magistrate's order.

14 It was admitted that the sum of 1*s.* 6*d.* was the proper proportion of the rate of 1*l.* 11*s.* 6*d.* which was attributable to the cost of the paving in question; and that if the appellant was not liable as the occupier of his house in High Street to contribute to the cost of such paving, the rate of 1*l.* 11*s.* 6*d.* ought to be reduced by the sum of 1*s.* 6*d.*

The question for the opinion of the Court was, whether under the circumstances above set forth, and having regard to the provisions of the Metropolis Local Management Act, 1855, and the

Metropolis Local Management Amendment Act, 1862, the appellant, as occupying the premises in High Street, Putney, was liable to contribute to the expense of the above-mentioned paving of the footpath on the north side of the Upper Richmond Road.

Feb. 17, 18. *The Appellant* in person. The rate is wrong in amount, for it is only the owners of the houses and land adjoining the Upper Richmond Road who can be assessed in respect of the expense incurred in paving the footpath.

First, the road is a "new street" within the Metropolis Management Act, 1855, s. 105, for that expression may be understood in its ordinary sense, and not only in the meanings given to it by the interpretation clause (s. 112) of the Metropolis Management Amendment Act, 1862. The facts stated in the case shew that the houses at least upon the north side form a continuous row, and, therefore, the Court ought to draw the inference that a street has been formed: *Reg.* v. *Fullford.* (1) And it is submitted that this question is concluded by *Pound* v. *Plumstead Board of Works* (2) and *Lord Northbrook* v. *Plumstead Board of Works.* (2)

Secondly, the district board were bound to charge the cost of paving the footpath upon the owners of the adjoining houses and land under 18 & 19 Vic. c. 120, s. 105, (3) as varied by 25 & 26

(1) Leigh. & Cave, 403; 33 L. J. (M.C.) 122. 10 Jur. N.S. 522.

(2) Law Rep. 7 Q. B. 183.

(3) By the Metropolis Managemen Act, 1855 (18 & 19 Vict. c. 120), s. 96: "Every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act; but all expenses, which under any such law ought to be defrayed by highway rates, shall be defrayed by means of the rates to be raised under this Act."

Sect. 98: "It shall be lawful for every vestry and district board, from time to time, to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board shall think fit."

Sect. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved,

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Vict. c. 102, s. 77; the words of these enactments are compulsory, and do not allow the district board to exercise a discretion. The district board, however, have proceeded under 18 & 19 Vict. c. 120, ss. 96, 98. This, it is submitted, they had no power to do; s. 105 is a special provision, whilst s. 98 is a general enactment; and the maxim applies, generalia specialibus non derogant: when two statutes are inconsistent, the later must be construed as a repeal of the earlier: *Daw* v. *Metropolitan Board of Works* (1); and when two provisions in the same statute are inconsistent, the one applying to a smaller class of subjects must be treated as an exception out of the one applying to the larger class, for "the rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception:" per Best, C.J., in *Churchill* v. *Crease.* (2)

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as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board)."

Sect. 158 and s. 161 contain provisions for defraying the expenses of vestries and district boards by, amongst other means, "a general rate."

Sect. 250: "In the construction of this Act 'the metropolis' shall be deemed to include . . . . the parishes . . . . mentioned in . . . . schedule . . . . B."

Putney is a parish mentioned in schedule B.

By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77: "Where any vestry or district board shall, under the powers given by the one hundred and fifth section of" 18 & 19 Vict. c. 120, "have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein; provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do."

Sect. 112 contains a similar definition of the "metropolis" to that in 18 & 19 Vict. c. 120, s. 250.

(1) 12 C. B. (N.S.) 161; 31 L. J. (C.P.) 223.

(2) 5 Bing. 177, at p. 180.

[QUAIN, J. One mode of solving the difficulty would be by holding that s. 105 is only directory, and, therefore, that the proceedings in the present case under s. 98 are valid: *Nowell* v. *Mayor, &c., of Worcester.* (1)]

The effect of the proceedings under s. 98 is to make the cost of the work payable out of the general rate under ss. 158 and 161; and it is submitted that an injustice would be done to the ratepayers, if they were called upon to pay for a work, the benefit of which is chiefly experienced by the owners of the adjoining houses and land. (2)

Edward Clarke, for the respondents. It is submitted that the facts of the case shew that the Upper Richmond Road was a street in 1855; and therefore in 1874 the district board had no power to charge the adjoining owners under 18 & 19 Vict. c. 120, s. 105, with the cost of paving the footpath; they were compelled to proceed under s. 98.

[GROVE, J. We do not think that question open to the respondents; we must take it that the case was intended to raise the question, whether the road has become a "new street" since 1855.]

The decision of the district board, whether or not the road is a "new street," ought to be accepted; for owing to their local knowledge they have the best means of judging as to its real condition.

[GROVE, J. In *Reg.* v. *Dayman* (3) it appears to have been held by the majority of the Court of Queen's Bench, that the question, whether a road is a "new street," is to some extent one of fact.

QUAIN, J. That case does not apply here, where the question is submitted to us as one of law.]

Then it is contended that the district board have a general discretion as to the regulation of the matters which the legislature

(1) 9 Ex. 157; 23 L. J. (Ex.) 139.

(2) The appellant also contended that to construe s. 105 as merely giving the district board a discretion would render that section superfluous, because other sections of the Act enabled the board to do all that s. 105, if construed as discretionary, would enable them to do; and, further, that if the board could lawfully proceed under 18 & 19 Vict. c. 120, s. 98, the general body of ratepayers ought to be wholly or partially exempted under s. 159; as to this he relied upon *Howell* v. *London Dock Co.*, 8 E. & B. 212; 27 L. J. (M.C.) 177; but owing to the view taken by the Court it became unnecessary to decide these questions.

(3) 7 E. & B. 672; 26 L. J. (M.C.) 128.

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has placed under their control, and that s. 105 was merely intended to give them a power which, at their option, they might exercise; but that it was not intended to fetter them in deciding what was the best mode of discharging the duties imposed upon them. The appellant's contention makes that section conflict with s. 98.

The Appellant was not called upon to reply.

GROVE, J. This case has been argued before us at some length; but the matter really at issue between the parties is rather narrow. [His lordship stated the facts of the case.] I think it plain that the Upper Richmond Road has become a "new street" since 1855: upon this point the question is, in my opinion, concluded by *Pound* v. *Plumstead Board of Works* (1), which seems to me to have been an à fortiori case to the present: here the Upper Richmond Road has become a "street" in the true sense of the term, and nothing is wanting to render that an appropriate designation.

Then comes the question, whether it was optional with the district board to pay for paving the footpath as an expense incurred under s. 98 of the Metropolis Management Act, 1855; or whether the board were bound to charge the cost of the work upon the owners of the adjoining houses and land, under s. 105 of that statute, as extended by the Metropolis Management Act, 1862, s. 77. Upon an examination of the enactments, I am of opinion that it was compulsory upon the board to proceed under s. 105, and to charge the adjoining owners with the cost of the work. The board had power under that section to determine, whether it was necessary or expedient that the footpath should be paved; this, no doubt, was a matter lying within their discretion; but when they had determined that the work should be executed, it became obligatory upon them to obtain payment for the cost of it from the adjoining owners. The language of the section is clear and precise: "the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." These words are as strong as legislative language can well be; for it is enacted that the adjoining owners "shall on demand pay," and

(1) Law Rep. 7 Q. B. 183.

not merely that it shall be lawful for the board to demand payment from them; therefore, if the section be read without reference to the other portions of the statute in which it is contained, it is clearly imperative. But it is urged that if it be construed in this manner, it is in conflict with s. 98, which provides that vestries and district boards may cause streets to be paved or repaired; and I think that if s. 105 had not been inserted, the expense of paving a new street would probably have fallen upon the general body of ratepayers, for works done under s. 98 are to be paid for by a general rate, under ss. 158 and 161; but I do not see any real inconsistency between the two enactments. Sect. 98 is general in its terms, and imposes a general duty; s. 105 refers to new streets which are insufficiently paved, and, amongst other matters, enacts that the owners, and not the ratepayers at large, shall bear the expenses of providing and laying the pavement. For it is those who are interested in the adjoining houses and land that derive the chief benefit; and I am entirely of opinion that this is a proper occasion for applying the maxim, "Qui sentit commodum, sentire debet et onus;" therefore those having houses at a distance ought not in the first instance to be called upon to contribute, although when the pavement is finished a different rule may be applied, and the expense of repairing it may be thrown upon the general rate. I repeat that the sections do not appear to me to be inconsistent; but if they had been inconsistent, I should have thought that s. 105, being the special provision, must have been read as qualifying s. 98, which is the general provision. The rate must be reduced, and judgment must be entered for the appellant.

QUAIN, J. I am of the same opinion. Two of the questions argued require our decision: first, whether the Upper Richmond Road was a "new street;" secondly, whether, if it was, the district board were bound to levy the cost of paving the footpath upon the owners of the adjoining land and houses.

As to the first point, I think it quite plain that the road has become a "new" street, within the principle of *Pound* v. *Plumstead Board of Works* (1), since 1855; for the houses which have been or will be built, will form a continuous row on each side.

(1) Law Rep. 7 Q. B. 183.

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As to the second point, it may well be that it was discretionary with the district board to determine whether the footpath should be paved, and yet that when they had resolved upon taking that step, it became compulsory upon them to throw the cost of the works upon the owners of the adjacent land and houses. In fact, the second question resolves itself into this, whether the expense of laying down the pavement is to be met under the Metropolis Management Act, 1855, s. 98, or under s. 105 of that statute as varied by s. 77 of the Metropolis Management Amendment Act, 1862. It may be laid down as a rule for the construction of statutes, that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby, and not by the terms of the general provision. I think that, upon the true construction of the statutes in question, the soil of a "new street" must be paved and put in order at the expense of the owners of the adjoining land and houses; but that when this has been done, it is to be repaired out of the funds raised by the general rate (1); for the 105th section of the Metropolis Management Act, 1855, seems to draw a distinction between paving and keeping in repair; but, in any event, as the Upper Richmond Road is a "new street," the expense of paving it cannot be thrown upon the ratepayers at large. I think that the rate appealed against was wrong, and must be reduced.

Judgment for the appellant.

Solicitors for respondents: *Cooper & Reeve.*

(1) See *The Queen* v. *Hackney Board of Works*, Law Rep. 8 Q. B. 528.

FORDER *v.* HANDYSIDE.

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Jan. 29.

Income Tax—5 & 6 *Vict.* c. 35, *s.* 100, *Case I., Rule* 3—*Deductions for Depreciation of Buildings, Plant, and Machinery—Additions to Capital.*

A company carrying on business as ironfounders set apart, in accordance with their articles of association, a sum of money from their net profits for depreciation of buildings, fixed plant, and machinery, and claimed, in making a return under Sched. D. of their annual profits or gains, to deduct this amount:—

Held, that such a deduction was contrary to 5 & 6 Vict. c. 35, s. 100, Case I., Rule 3, as the amount set aside was in effect an addition to capital.

CASE stated under 37 Vict. c. 16, ss. 8, 9.

An assessment under Schedule D. of 5 & 6 Vict. c. 35, was made for the year 1874–5 by the commissioner for the district of Morleston and Litchurch, in the county of Derby, upon the respondents, Andrew Handyside & Co., carrying on the business of ironfounders, in the parish of St. Alkmund, in Derby. The company were assessed at the sum of 8642*l.*, the amount taken from their own report, and therein specified as net profits, but in this amount was included a sum of 1509*l.* 7*s.* 6*d.*, shewn in the report as the amount written off for depreciation of buildings, fixed plant, and machinery. (1)

The company, on their appeal to the commissioners against this assessment, on the 29th of June, 1875, produced a balance-sheet for the year ended on the 31st of July, 1874, being their first year of trading, and objected to the charge in respect of the 1509*l.* 7*s.* 6*d.*, and contended that inasmuch as such sum had no real existence, but was written off in the accounts in accordance with the articles of association, as the works must of necessity depreciate from year to year, and as the sum expended in repairs could not entirely replace such depreciation, they were justified in writing off that amount as a deduction. (2)

(1) It was admitted on the argument that the company had written off a certain amount for the repairs actually executed, and that they might properly do so.

(2) The 138th article of association was as follows:—

"The directors may from time to time, before recommending any dividend, set aside out of the net profits of the company such sum as they think proper as a reserve fund for the purpose of meeting contingencies, or of purchasing, improving, enlarging, rebuilding, restoring, reinstating, or maintaining the works, plant, and other pre-

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The surveyor objected that the sum appealed against was a deduction in respect of capital, and as such, was contrary to the provisions of 5 & 6 Vict. c. 35, s. 100, Case I., Rule 3 (1); that no allowance for depreciation was provided for in the Act; and that s. 159 of the Act prohibited any deductions being made, except those expressly enumerated.

The majority of the commissioners being of opinion that persons in trade were equitably entitled to write off from their profits each year a sum for depreciation, and that the amount claimed was fair and reasonable, decided in favour of the company; but the surveyor being dissatisfied with their decision, they stated a case for the opinion of the Court.

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mises or property of the company, or the erection or construction of new buildings, works, or plant, or for equalising dividends, or for any other purposes connected with the business of the company, or in furtherance of any of the objects of the company; and the same may be applied accordingly from time to time in such manner as the directors may determine. The reserve fund, or such part thereof for the time being as is not invested as hereinafter provided, may be used for the general purposes of the company. The interest of the reserve fund shall be treated as annual profits of the company.

(1) This rule applicable to duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act, is as follows:—

"In estimating the balance of profits and gains chargeable under Schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against, or deducted from, or allowed to be set against, or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed, or intended to be employed, as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purpose of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts, except bad debts, proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

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The question for the Court was, whether the deduction should be allowed.

Pinder, for the Crown. The sum set aside for depreciation cannot be deducted under the Income Tax Act, since it is in fact an addition to capital. A similar case, *Addie & Sons* v. *Solicitor of Inland Revenue* (1), has been before the Scotch Courts, and was decided in favour of the Crown.

Grantham, contrà. This case is not brought within the Scotch case, because sinking a shaft is a new investment exactly resembling the original one. The Act was intended to apply to capital, which this cannot be said to be. This company has not been

(1) 12 Scotch Law Rep. 274. The judgment of the Lord President in this case was read in the course of the argument, and was as follows :—

"The appellants, Messrs. Addie & Sons, have been assessed under Schedule D. of the Income Tax Act in respect of profits arising from their business as ironmasters, and they say there ought to have been deducted from the amount of profits upon which they were so assessed, two sums of 5525*l.* and 4435*l.*, being a percentage for pit sinking and for depreciation of buildings and machinery, and this they maintain upon the ground that the sinking of new pits, although it be only an occasional thing, is still part of what may fairly be called the annual expenditure which they necessarily incur in realizing the profits from their trade. I think there is only one point to be determined here, and not two as represented, because the machinery and buildings connected with a pit appear to me to be just part of the pit itself. It is one compound structure necessary for the working of the mine, and the question comes to be, whether under the special rules of the Income Tax Act, they are entitled to deduct something on account of the amount expended in making a new pit.

"Now, I am quite clear that the making of a new pit in a trade of this kind is, in every sense of the term, just an expenditure of capital. It is an investment of money—of capital—and must be placed to capital account in every properly kept book applicable to such a concern. Now, if that be so, it seems to me that the provision of the 3rd rule under the first head of s. 100 of the Property Tax Act, is conclusive upon the question before us, because it is there provided that in estimating the balance of profits and gains chargeable under Schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or be allowed to be set against, or deducted from such profits or gains on account of any sum employed, or intended to be employed as capital in such trade. It seems to me that it is quite unnecessary to go beyond that one part of the statute. No doubt some support may be had also from the 159th section, but I think this rule is in itself perfectly conclusive. As soon as you ascertain that this is an expenditure of additional capital, there is an end to any proposal to deduct anything in respect of it, and on that simple ground I think the judgment of the commissioners right."

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working for more than a year and a half, so that no average can be struck on three years, but they are entitled to deduct something, and if they now deduct too much they can be surcharged at the end of three years, when the average repairs can be accurately ascertained.

Pinder was not heard in reply.

KELLY, C.B. I think it is clear that the respondents are not entitled to this deduction. It appears that by the 138th section of the articles of association there is a provision that a reserve fund is to be formed, and before paying a dividend the company agree to set aside a sum from the net profits as a reserve fund for the purpose of meeting contingencies. But these are matters which they have no right to deduct from the net profits and say that the net profits are thereby diminished, and that they have not really netted that amount of profits. What they say is that it is "for the purpose of meeting contingences or of purchasing, improving, enlarging, rebuilding, restoring, reinstating, or maintaining the works, plant, and other premises or property of the company." Now I leave out the word "repairing," because it is admitted that they are entitled to deduct, and they have deducted, a certain sum for repairs; and we must take it for granted, as there is no appeal against that deduction on the one side or the other, that it is a proper deduction according to the Act of Parliament. The statements in the case as to the sum dealt with as well as one mode of dealing with it, namely, equalizing profits, shew clearly that these are net profits, and it is against the Act of Parliament to allow this deduction, as to which the Act is quite explicit.

POLLOCK, B., concurred.

HUDDLESTON, B. I am of the same opinion. It is quite clear, on reading this case, that the sum of 1509*l.* is a sum which a prudent person would put by for the purpose of meeting what might be called the expenses of renewal. The articles of association clearly contemplate that it should be carried into the capital account as a reserve fund. The articles of association contemplate that the company might make use of this money, but if they did

it would be in the capital account, and it would be treated for all purposes of book keeping, and for all usual purposes, as capital. The Scotch case which has been referred to supports that view, because, of the two sums, 5000*l.* was to have supplied the building necessary for the new pit, and 4000*l.* was there, as here, written off for the depreciation, and the Scotch Court thought that both were clearly capital. Then, if it be capital, it is quite clear that it comes within the 3rd rule, and cannot be deducted, and that 3rd rule is rendered still more imperative by the 159th section of the Act, which says that no deductions shall be made other than those expressly enumerated in this Act.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for respondents: *F. Stanley.*

WESTMAN *v.* AKTIEBOLAGET EKMANS MEKANISKA SNICKARE-FABRIK.

Feb. 23.

Practice—Service of Notice of Writ out of Jurisdiction—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 19—*Judicature Act, Order II., Rule* 4; *Order XI., Rules* 1 *and* 3 — *Liability of foreign non-resident Corporation to be sued.*

Under the Judicature Act, Order XI., Rule 1, as under the Common Law Procedure Act, 1852, s. 19, where the defendant is a foreigner out of the jurisdiction, notice of writ must be served, and not the writ itself.

Whether a foreign non-resident corporation can or cannot be served with process, there is nothing to prevent the issue of a writ against it.

THIS was an application on behalf of the defendants, a foreign corporation, to set aside a writ of summons and service thereof and all subsequent proceedings.

It appeared that the defendants were a corporation according to the law of Sweden, and carried on their business at Stockholm in that kingdom, and had no place of business in England. The plaintiff, being desirous of suing them for non-delivery of certain goods, obtained at Chambers leave under Order II., Rule 4 (1), and

(1) No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a court or judge.

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Order XI., Rule 1 (1), of the Schedule to the Judicature Act, 1875, to issue a writ against the defendants, and to serve such writ out of the jurisdiction. The writ was according to Form 2, Part I., Appendix A., and was served on the defendants at Stockholm, a statement of claim being delivered at the same time.

R. V. Williams, for the defendants. Sect. 19 of the Common Law Procedure Act, 1852, has no application to corporations: *Ingate* v. *Austrian Lloyd's Co.* (2); therefore, unless there is something in the Judicature Act to qualify this decision, it is binding, and this corporation cannot be served with any process.

Further, Order II., Rule 4, and Order XI., Rule 1, speak of a writ or summons of which notice is to be given out of the jurisdiction; this assumes the existence of such a practice as serving notice of writ on a foreigner out of the jurisdiction, instead of the writ itself. As there is nothing in the Judicature Acts which provides for such service, the practice remains as it was under the Common Law Procedure Act, s. 19. By Order XI., Rule 3, an affidavit must be made shewing in what place a defendant is, and whether he is a British subject; this order also speaks of a writ "or notice." If, therefore, a foreign non-resident corporation can be got at by any process, it must be by service of notice of the writ, and not by service of the writ itself.

E. Lumley, for the plaintiff. As to the second point, the effect of Order XI. is to leave it to the discretion of the Court or judge whether to grant leave to serve the writ or notice of it. The action need not be in one of the Common Law Divisions, and the

(1) Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing, affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved or annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

(2) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

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practice throughout must be taken to have been assimilated to the old Chancery practice, by which the bill was served and a time limited for appearance. As to the main point, whether a foreign corporation can be sued at all, nothing has been shewn to prevent it: *Newby* v. *Van Oppen* (1) shews that when carrying on business in England they may be sued. The only difficulty with regard to a non-resident foreign corporation used to be—what would constitute service, but now, by s. 100 of the Judicature Act, 1873, "defendant" is to include every person served with any writ of summons, and, by Order LXIII. "person" is to include a body corporate—so that a foreign corporation may be made defendants.

R. V. Williams, in reply.

KELLY, C.B. There are two questions in this case; first, whether a foreign corporation having no residence in this country can be sued at all, and, second, whether, if it can, the process and procedure being assimilated by the Judicature Acts, service can be effected on it out of the jurisdiction. The latter is a question on which, if I were now called on to give an opinion, I should feel great difficulty, but on the facts, I think, we have sufficient to dispose of this application without deciding that matter. I think the learned judge's order wrong in one respect, that it directs service of the writ itself, but the first point is not whether the action is maintainable, but whether a writ may lawfully issue. I am of opinion that it may. I see nothing that makes it unlawful to issue such a writ. It may be that when the defendants hear of the writ and cause of action they may appear, but, at all events, I see nothing contrary to the law of this country or the comity of nations in permitting such a writ to issue. The application to set aside the writ must, therefore, be refused. With regard to the service of the writ the matter is different. The Common Law Procedure Act, 1852, authorized the issuing of a writ in Courts of Common Law against a person resident abroad. If he were a British subject the writ might be served, but if he were a foreigner all that could be done was to give him notice of the writ. We have then to see if there are any provisions in the Judicature Acts altering that practice. The only alteration we find goes to this extent,

(1) Law Rep. 7 Q. B. 293.

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that by Order II., Rule 4, "no writ or summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a court or judge." The distinction previously existing between service of a writ and of notice is continued, and that being so, the service of this writ must be set aside.

BRAMWELL, B. I am of opinion that we ought not to set aside the order permitting the issue of the writ, because a foreign corporation is suable in this country, and so a writ may lie against it. Suppose, for example, the company should establish an office in England next year, the writ might be kept alive and made available against it, so as to defeat what might otherwise be a successful plea of the Statute of Limitations. I think, therefore, the writ in this case was properly issued. As at present advised, I think the writ may be made available by serving notice of it out of this country. My reason for thinking so is, that formerly equity process might be served out of the jurisdiction on a defendant, and that now the expression "defendant" includes a corporation as well as a person. If, therefore, before the Judicature Act equity process might have been served on a foreign corporation out of the country, and if it was not intended to take away that power, it must have been intended to put all the procedure on the same footing, and, therefore, by implication, to serve a foreign corporation out of the jurisdiction. *Ingate* v. *Austrian Lloyd's Co.* (1) must be considered therefore as practically repealed. (2) On these two grounds, that the company may be sued, and that they may be served with process, I think the order so far right; but I express on the latter point an opinion subject to reconsideration should the question come before us again. It seems to me, however, that the remainder of the order must be set aside on the ground that, if the defendants can be served at all, it is clear they must be served as individuals under the same circumstances would be served, that is with notice of the writ.

AMPHLETT, B. I am of the same opinion. Looking at the

(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.
(2) See now *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404.

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rules to the Judicature Acts, I can see nothing in them to exclude the right of a plaintiff to serve process on a foreign corporation. Before those Acts no leave was necessary for serving a foreigner out of the jurisdiction, but there was no provision as to the way in which service could be effected, and hence arose the difficulty in serving a foreign corporation. That difficulty did not exist in courts of equity, because a plaintiff had to go to a court for leave to issue process, and no doubt the judge, in giving it, would direct the particular mode of service. Now it seems to me that difficulty is removed, and I apprehend that if a plaintiff wishes to sue a foreign corporation he would go before a judge and get directions as to the mode of service. The reasons therefore that influenced the decision of the Court in *Ingate* v. *Austrian Lloyd's Co.* (1) are not now applicable. There are no restrictions in the Judicature Acts, and I am unable to see, on the reason of the thing, why, when once you are satisfied that a foreign corporation may be served as easily as an English one, it should not be. On this point, however, I reserve my opinion, as I do not wish to conclude myself should the case come before us again.

Service of writ set aside, but motion to set aside the writ refused.

Solicitors for plaintiff: *Sharpe, Parkers, & Co., for Hawkes & Weekes, Birmingham.*

Solicitors for defendant: *Ingle, Cooper, & Holmes.*

(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

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Jan. 29.

GRENFELL *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Foreign Security issued in the United Kingdom—34 Vict. c. 4, s. 2.

1 Asp Cas 487

A company, duly incorporated under the laws of the United States of America, and having its chief seat of business at New York, invited tenders for bonds of the value of $2,000,000, which were tendered for and purchased by a firm in New York, where the purchase-money was paid, and the bonds handed over, the name of the payee being left blank. The bonds were then sent to England, and advertised for sale there by the agents of the purchasers, who issued prospectuses, letters of allotment, and scrip certificates, and delivered the bonds to purchasers:—

Held, that the issue of the bonds was completed at New York, when the company parted with the possession of and control over them, and that they were not therefore foreign securities issued in England, within the meaning of 34 Vict. c. 4, s. 2, so as to be liable to stamp duty.

CASE stated by the Commissioners of Inland Revenue, pursuant to the 19th section of the Stamp Act, 1870 (33 & 34 Vict. c. 97), on appeal against an assessment made by the commissioners, declaring the liability of the following instrument to stamp duty under 34 Vict. c. 4, s. 2 (1):—

"No. 524.

"The Delaware and Hudson Canal Company Coupon Bond.

"Know all men by these presents that the president, managers, and company of the Delaware and Hudson Canal Company, hereby acknowledge themselves to be indebted unto or assigns, in the sum of one thousand dollars, lawful money of the United States, which sum the said the president, managers, and company of the Delaware and Hudson Canal Company promise to pay to the legal holder hereof at the office of the said Canal Company, in the city of New York, on the 1st day of October, 1894,

(1) 34 Vict. c. 4, s. 2: "The term foreign security means and includes every security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company, bearing date or signed after the 3rd day of June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note),—

(1.) Which is made or issued in the United Kingdom, or

(2.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom."

with interest thereon at the rate of 7 per cent. per annum, payable semi-annually on the 1st day of April and October in each and every year upon presentation and surrender of the annexed interest warrants, as they severally become due and payable. And said company hereby agree that the holder of this bond may transfer the same at pleasure, either in person or by attorney, but only on the books of the company at their office in the city of New York, such transfer to be endorsed hereon by the treasurer. This bond is one of a series of five thousand bonds of like tenor, date, and amount, representing a loan or debt in the aggregate of five millions of dollars, in respect of which it is, by virtue of a resolution of the board of managers, passed June 25th, 1874, hereby expressly understood, covenanted, and agreed by the said canal company with the legal holder hereof, that for the purpose of securing this and the other bonds above mentioned, if the property of the company in Pennsylvania (which is now unencumbered) shall hereafter at any time before the maturity of the said bonds be mortgaged, such mortgage shall include, cover, and secure this and the other bonds in said series, and the debt thereby created.

"In witness whereof the said the president, managers, and company of the Delaware and Hudson Canal Company, in pursuance of a resolution of the board of managers, passed June 23rd, 1874, have caused these presents to be signed by their president and treasurer, and their corporate seal to be hereunto affixed at their office in the city of New York, this first day of October, A.D. 1874.

"Signed by Thomas Dickson, President.

"Signed by J. C. Hartt, Treasurer."

Coupons were attached for the interest, payable at the office of the company in New York.

One of the endorsements was as follows:—

"This bond may be registered in the owner's name on the company's books, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid, unless made on the company's books by the registered owner, and similarly noted on the bond, but the same may be discharged from

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registry by being transferred to bearer, after which it shall be transferable by delivery, but it may be again registered as before.

"The registry of the bond as above shall not restrain the negotiability of the coupons by delivery."

The following facts appeared from the case :—

The Delaware and Hudson Canal Company is a company duly incorporated under the laws of the United States of America, its chief seat of business being at New York.

At a meeting of the board of managers, held on the 25th of June, 1874, it was resolved to issue $5,000,000 in the bonds of the company, payable twenty years from date, bearing interest at 7 per cent., payable semi-annually, and a circular to their shareholders, notifying them that subscriptions upon the terms stated therein would be received for the bonds until September then next.

In response to such circular numerous applications were received, and bonds issued in accordance therewith, leaving a balance of bonds amounting in the aggregate to $2,000,000 unissued.

In the month of January, 1875, the board of managers intimated to various banking firms in New York that they were prepared to receive tenders for the whole or any portion of the remaining $2,000,000, and on the 29th of January, 1875, the parol bid of Messrs. Morton, Bliss, & Co., bankers of New York, for the whole $2,000,000, at a certain price, was accepted, and the bonds awarded to them.

Two other firms were in fact interested with Messrs. Morton, Bliss, & Co., in the tender made by that firm in certain proportions as between themselves, and they, in proportion to their respective interests, paid the Delaware and Hudson Canal Company, in New York, for, and in due course received, their rateable proportions of bonds. As between Messrs. Morton, Bliss, & Co., and their associates, it was understood that the resale or negotiation of the bonds should be entrusted on their joint account and according to their respective interests to Messrs. Morton, Rose, & Co., of London, and in due course the owners of the bonds in New York transmitted them to Messrs. Morton, Rose, & Co., who

prepared a prospectus for the public sale or negotiation in this country of the $2,000,000.

The prospectus was headed—

"Prospectus.

"Delaware and Hudson Canal Company.

"Issue of $2,000,000 (balance of 5,000,000) Seven per Cent. Currency Bonds of $1000 each.

"Interest payable 1st April and 1st October; Principal repayable 1894.

"Messrs. Morton, Rose, & Co. invite subscriptions for the above $2,000,000 Seven per Cent. Currency Bonds of the Delaware and Hudson Canal Company."

It then gave the price of issue, and the amounts and times of payment of instalments, and particulars of the bonds and the company.

Amongst numerous other applications, Messrs. Morton, Rose, & Co. received, in response to their prospectus, an application from one Rutter, of Brighton, for an allotment of $15,000 on the terms of such prospectus, and accordingly they shortly afterwards allotted $15,000 to him. Notice of this allotment, subject to the payment of 450*l.*, the amount payable on allotment, for which a form of receipt was annexed, was sent, and contained the usual statement that scrip would be delivered on presentation of the allotment letter endorsed by the allottee.

Rutter paid the 450*l.* due on allotment, and shortly after endorsed the allotment letter, and caused the same to be exchanged at Messrs. Morton, Rose, & Co.'s for fifteen scrips for $1000 each, numbered from 151 to 165 inclusive. The remaining instalments on scrip No. 159 were duly paid, and that scrip, with the receipt for subsequent instalments appended was produced to Messrs. Morton, Rose, & Co., and by them exchanged for a bond of the Delaware Company numbered 524. Mr. Grenfell, the appellant, instructed his brokers to purchase for him on the London Stock Exchange one bond of the Delaware and Hudson Company for $1000, and the bond numbered 524 above referred to was delivered to him and became his property.

Application was made to the president of the company by

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Messrs. Morton, Rose, & Co., for his sanction to the use of the name of the company as authorizing the prospectus. The president, however, replied: "I regret that I cannot comply with your request, as I am unwilling to place the company in a position where they might have a seeming interest in the negotiation of securities which have passed out of their hands."

The bonds, as issued by the Delaware and Hudson Canal Company, carried interest at 7 per cent. from the 1st of October, 1874, the first half-yearly coupons being payable on the 1st of April, 1875. By the terms of Messrs. Morton, Rose, & Co.'s prospectus, the purchasers from them of bonds were to be entitled to two months' interest only. On the 1st of April Messrs. Morton, Rose, & Co., accordingly annexed to their scrip certificates a coupon for two months' interest, payable the 1st of April, 1875, and the coupons on the bonds payable on the 1st of April, 1875, were detached by Messrs. Morton, Bliss, & Co., and the other owners of the bonds in New York, and cashed there by them, they being respectively debited by Messrs. Morton, Rose, & Co., with the amount of the coupons for two months' interest attached to the scrip.

The Commissioners of Inland Revenue being of opinion that the instrument was chargeable with stamp duty, as a foreign security for money exceeding 150*l.* and not exceeding 200*l.*, assessed the duty thereon at the sum of five shillings, and the instrument was stamped in conformity with the assessment.

The appellant being dissatisfied with the assessment, required the commissioners to state and sign a case to enable him to appeal against the same.

The question to be decided by the Court was—

Whether the instrument was chargeable with stamp duty or not.

R. E. Webster, for the appellant, contended that the whole transaction of the issue of these bonds was begun and completed in New York, and that the subsequent transfer to parties in England was not an issuing within the meaning of the Act. He referred to *Downes* v. *Richardson* (1), and *In re Imperial Rubber Co., Bush's Case.* (2)

(1) 5 B. & Ald. 674. (2) Law Rep. 9 Ch. 554.

Gorst, Q.C. (with him the *Attorney General* and *Pinder*), for the commissioners, contended that the correspondence between Morton, Bliss, & Co., in New York, and Morton, Rose, & Co., in England (which was set out in the case), treated the matter as an issue, and that the whole of the negotiation and the conduct of the parties shewed that it was so. He referred to *Attorney General* v. *Upton*. (1)

R. E. Webster, was not called on to reply.

KELLY, C.B. The Act of Parliament is very clear in its terms that the tax is imposed on any foreign security (which this is) made or issued in the United Kingdom, and this case turns on the meaning of the word "issue," and under what circumstances and at what time the issue of the capital of the undertaking has taken place here. In every case, whether of a loan to a foreign government, or a mine, or any other undertaking, there must be a period of time at which each individual shareholder, on taking one or more shares, becomes a member, and I think there can be but one such time for the issue of shares, which is the opening of the concern to the public. I do not agree, though it is a question of fact rather than of law, that there can be but one place of issue, for many undertakings are opened to the public simultaneously at various centres of commercial enterprise. In this case, however, the company is an American company, having its place of business in New York, and there the shares were offered to the public. Some of the bonds were taken up by the public, and then the company entered into negotiations with Messrs. Morton, Bliss, & Co., for the purchase by them of the remainder. Carrying out these negotiations, the company sold the bonds, and parted with their interest in them and control over them. The sale was a part of the issue which had begun before. It appears that other persons than Messrs. Morton, Bliss, & Co., were interested in the purchase, and all parties had agreed that Messrs. Morton, Rose, & Co., should act as agents in England for the sale there of the bonds. The whole of these bonds were accordingly transmitted to London, and there sold and delivered to the public. It is said that amounts to an issue. It is true there is a prospectus, forms of proposal for, and

(1) Law Rep. 1 Ex. 224.

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acceptance of, the bonds, letters of allotment, and issue of scrip, which was subsequently exchanged for bonds, but the transaction, although it is invested by these means with some importance, differs only in extent from a sale by the owner of even one of the bonds. The question arose incidentally in the case whether the bonds are transmissible from hand to hand, but on the back of the bonds there is a notice that the transfer may be registered, still they may be discharged from registry by being transferred to bearer, and the registry of the bond is not to restrain the negotiability of the coupons by delivery.

It is therefore, to all intents and purposes, a case in which the issue took place in New York, and it was merely in effecting what was essentially a sub-sale, that the bonds were disposed of in England, and under these circumstances it is clear to me that this is not an instrument liable to be taxed.

POLLOCK, B. As to the construction of the Stamp Act, I think it was very properly urged that the statute is not to be construed according to the strict or technical meaning of the language contained in it, but that it is to be construed in its popular sense; meaning, of course, by the words "popular sense" that sense which people conversant with the subject matter with which the statute is dealing would attribute to it. That being so, this is a statute as to the meaning of which we have some considerable assistance from the legislature itself; because, by the 113th section of the Stamp Act of 1870 (33 & 34 Vict. c. 97), under which, no doubt, the present bond would but for the later Act have been subjected to duty, we find a provision that "the term 'foreign security' means and includes every security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company, bearing date or signed after the 3rd day of June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note): 1, which is made or issued in the United Kingdom; 2, upon which any interest is payable in the United Kingdom; 3, which is assigned, transferred, or in any manner negotiated in the United Kingdom." The alteration made in the subsequent Act shews that the legislature thoroughly understood the matter with which it was dealing. When we come to

the Act of 1871, the words used are, that the term "foreign security" means and includes every security for money "which is made or issued in the United Kingdom." The present bond was not made in the United Kingdom, and the only question that remains is, was it issued? Now, with regard to the word "issue," I think it was very properly conceded that it could hardly be said there was any issue by the company in this country; but was there any issue in this country by Messrs. Morton, Rose, & Co., by whom this bond was sold, and who were the persons who were the means of putting these bonds into circulation? It is admitted that the transaction must be taken as being bonâ fide. That being so, I think it material to inquire, was there any issue in New York? because, though, as my Lord has stated, it was competent to the company to issue, at different periods, in the different capitals of Europe or elsewhere, bonds or securities, to my mind it cannot be said that a particular bond or share of the company has been issued twice. If I understand the word "issue," not giving to it any technical meaning, the issue of a bond is its first creation by the company, who give thereby a right of action in favour of some person to whom that bond is given. In the present case that was done, and done completely, in New York; because, although no bond was actually handed over in the first instance, a binding contract took place, whereby Messrs. Morton, Bliss, & Co. were entitled, on the one hand, to call upon the company to transfer and issue to them a number of the bonds, and, on the other hand, they incurred the correlative obligation of taking and accepting the whole of the liability upon them. When that state of circumstances arises, the bonds are issued, the contract is at an end, and the persons who are the holders of the bonds for all purposes are Messrs. Morton, Bliss, & Co.

It is immaterial to the purposes of this case how they dealt with them, whether they retained them themselves, or whether they sent them for negotiation in this or any other country; for what was done by Messrs. Morton, Rose, & Co. was simply a subsale in this country. Except in degree, it did not differ from the case of a single share which might be acquired by a merchant in New York, and which might be afterwards sent over to England to his agent, for him to deal with.

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On these grounds, I am of opinion that the appellant is entitled to judgment.

HUDDLESTON, B. I am of the same opinion. There was a complete contract for the sale of these bonds by the Delaware Company, and the bonds were bonâ fide sold and delivered and paid for, and became the absolute property of Messrs. Morton, Bliss, & Co. The company had no further title or property in them after payment of the money. I quite agree that we must take the popular and substantial meaning of the word, construed, as Bramwell, B., said in the case of *Attorney General* v. *Upton* (1), as ordinary English words should be construed by lawyers, that is to say, as ordinary people would construe them. I find, turning to a dictionary, that the popular meaning of issue is "sending out, as of notes from a bank." The legal meaning of the word "issue" we have in the decision *In re Imperial Rubber Co., Bush's Case* (2), which shews that the time of issue is the period when the company part with the control or power over the shares, the period when, in fact, the property vests in the allottee. Under these circumstances, it appears to me to be quite clear that this instrument does not require a stamp, and therefore our judgment must be for the appellant.

Judgment for the appellant.

Solicitors for appellant: *Bischoff, Bompas, & Bischoff.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

(1) Law Rep. 1 Ex. 224. (2) Law Rep. 9 Ch. 554.

ALLEN *v.* THE NEW GAS COMPANY.

1876
Feb. 26.

Master and Servant—Negligence—Foreman and Fellow-servant.

The defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendants, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to shew how this happened, nor any evidence that the manager and other persons employed by the defendants were incompetent:—

Held, that the defendants were not liable, as the plaintiff had not shewn that the persons employed by the defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow-workman of the plaintiff.

THIS was an action to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants. At the trial before Huddleston, B., in Middlesex, at the sittings after Trinity Term, 1875, a verdict passed for the plaintiff, with leave to the defendants to move to set it aside and enter a non-suit, or a verdict for them, on the grounds that there was no evidence of negligence on their part to render them liable; that the plaintiff was guilty of contributory negligence; and that the plaintiff was aware of the danger, and voluntarily undertook the risk.

The defendants were a joint stock company engaged in the manufacture of gas, and the plaintiff, who was a servant in their employ sustained injury by some gates on the defendants' premises falling on him. The evidence was, that these gates, if left open and wedged up, were safe; but if closed, or partially closed, there was danger that they might fall. On the day of the accident the plaintiff passed through the gates when they were open and wedged up, but on his return, some time afterwards, one of the gates was closed, and while in this condition they fell on and injured him as he was at work near them.

The other facts and the evidence are set out below in the judgment of the Court.

Jan. 21. A rule nisi having been obtained pursuant to the leave reserved,

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J. O. Griffits, Q.C., and *W. G. Harrison*, shewed cause. The verdict was right, on the ground that it was the duty of the defendants to employ a competent person to take charge of their premises. Further, the plaintiff had remained in the employment under a reasonable expectation that the gates would be rendered safe, and therefore the defendants were liable: *Holmes* v. *Worthington* (1) and *Holmes* v. *Clarke*. (2)

Day, Q.C., and *W. Graham*, in support of the rule. The danger in this case did not arise from the inherent condition of the gates, and there is nothing in the case to take it out of the rule, that to make the master liable, he should know, and the servant be ignorant, of the danger. In *Holmes* v. *Clarke* (2) there was a statutory duty on the defendants to fence the machinery. Here the negligence, if any, which caused the accident must have been that of one of the fellow-workmen closing the gates; or, if it is said to be that of the foreman, he is the fellow-servant of the plaintiff: *Howells* v. *Landore Siemens Steel Co.* (3); *Feltham* v. *England*. (4) The defendants cannot personally superintend, the plaintiff must therefore, to make them liable, shew that the persons employed by them were incompetent: *Wilson* v. *Merry*. (5)

Cur. adv. vult.

Feb. 26. The judgment of the Court (Bramwell, Amphlett, and Huddleston, BB.) was read by

HUDDLESTON, B. This was a rule to set aside a verdict for the plaintiff for 150*l.*, and enter a nonsuit or a verdict for the defendants, "on the ground that there was no evidence of negligence on the part of the defendants to render them liable."

There were other grounds on which the rule was argued, but which, in consequence of the view we take, it does not become necessary for us to consider.

The plaintiff was a servant, at weekly wages, to the defendants,

(1) 2 F. & F. 533.
(2) 6 H. & N 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356.
(3) Law Rep. 10 Q. B. 62.
(4) Law Rep. 2 Q. B. 33.
(5) Law Rep. 1 H. L., Sc. 326.

7 Jur. N.S. 398, 5 L. 992.

who were a joint stock company, limited, for the manufacture and sale of gas, and the injuries he complained of were caused by the falling of some gates upon him. The evidence applicable to this part of the case was that these gates were built into a framework on the premises of the defendants where the plaintiff was at work. They had been out of repair for some time, and had been gradually getting "from bad to worse." If closed, or partially closed, they were unsafe; but if left open, and wedged up, they were safe. On the day of the accident, the plaintiff and another man, who were in the employment of the company, had gone through the gates with coke for the purpose of stoking the furnace before breakfast, and the gates were then open, and wedged up; but on the plaintiff's return from breakfast, one gate was open and the other was shut. How this occurred was not shewn. The plaintiff attributed it to the effect of the wind; another witness thought that it could not be the wind, but that somebody must have moved them; but there was no evidence to shew that any one had touched the gates in the meantime.

While the plaintiff was preparing to set about his work, being on the defendant's premises and within a few feet of the gates, they suddenly fell upon him. The attention of a person of the name of Farren, who was described as the company's manager, had been called to the unsafe condition of the gates a considerable time before the accident, and he had promised to have them seen to. It was not shewn that he had not fulfilled his promise, but directions had been given by the foreman of the blacksmiths to one of his men to make a bar to go across the gates. That had not been done, because, as the witness said, there was not the right size of iron on the premises to make the bar. After the accident the gates were put up, and such an iron bar was placed across them to prevent them from falling. At the trial the verdict was entered for the plaintiff, with leave to the defendants to move to enter a nonsuit or verdict for the defendants, the Court to draw inferences. It was urged on the part of the defendants that there was no evidence to fix them with negligence, and *Wilson* v. *Merry* (1) was relied on.

(1) Law Rep. 1 H. L., Sc. 326.

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We think that the mischief in this case arose from the conduct of the plaintiff's fellow-workmen as such, and not from the defendants' default, nor from the default of any manager or vice-proprietor, and that, therefore, the defendants are not liable. The gates were dangerous when shut, not dangerous when against the wall and wedged up. Now, either some workmen as such moved the gates, or the wind did so, and then the workmen ought to have replaced them. It was therefore by the improper moving of the gates by a workman, or by their being improperly left open by the workmen, that the mischief happened. The case is like this,—there is an unsafe ladder, it is shut up and not used, a workman takes it out and does not replace it, and then another workman uses it and is hurt; the master would not be liable. If there be any distinction between this case and the case in the House of Lords we prefer that it should be drawn by the Court of Appeal. But, further, the authorities referred to establish the principle that in the event of the master not personally superintending and directing the work his sole duty is to select proper and competent persons to do so, and to furnish them with adequate materials and suitable means and resources for accomplishing the work. This was fully explained by the present Lord Chancellor in *Wilson* v. *Merry* (1), and Lord Colonsay in his judgment (2) points out what duties may be incumbent on masters with reference to the safety of their labourers, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible.

To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence. This is clearly pointed out by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (3): "Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any

(1) Law Rep. 1 H. L., Sc. 326. (2) At p. 344.

(3) 3 Macq. at p. 282.

person other than him who actually caused the damage, it lies on the person injured to shew that the circumstances were such as to make some other person responsible": and by Mr. Justice Willes in *Lovegrove* v. *London and Brighton Ry. Co.* (1): "It is not enough for the plaintiff to shew that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation"; as, also, by Erle, C.J., in *Cotton* v. *Wood.* (2) *Feltham* v. *England* (3) is to the same effect. Here there was no evidence that the defendants undertook personally to superintend and direct the works; on the contrary, from the fact of their being a joint stock company, the direct inference would be the other way; nor that Farren, whatever may have been his position, which is not clearly defined, was either an incompetent or an improper person. It may be doubted whether the falling of the gates can be attributed to the negligence or carelessness of Farren, as some orders, probably emanating from him, seem to have been given by somebody as to the repair of the gates.

But assuming it to have been the negligence of Farren, his negligence would, as before pointed out, be that of a fellow-servant; for which, according to the cases cited, the defendants would not be liable. There was no evidence of the incompetency of any other servant whose duty it must have been to have seen that the gates were put into a state of repair.

The evidence as to the want of sufficient materials pointed only to the absence of a proper size of iron to make the bar. We doubt very much whether the providing a proper iron bar would have done more than have secured the gates properly when closed. At all events, we cannot infer that in a company such as the defendants there was not a person whose duty it was to see that there was a proper supply of iron, and if there was such a person, his negligence would not affect the defendants unless he were incompetent, and of that there was no evidence.

(1) 16 C. B. (N.S.) at p. 692; 33 L. J. (C.P.) 329. 10 Jur. N.S. 879

(2) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333. (3) Law Rep. 2 Q. B. 33.

7 Jur. N.S. 168.

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By suitable means and resources, we think must be meant all that was necessary to carry on the business, including premises reasonably safe for that purpose, as, for instance, in case of a mine, of a proper system of ventilation as pointed out by Lord Colonsay in *Wilson* v. *Merry* (1); but there was no evidence to shew that the premises of the defendants were dangerous, that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to shew that such persons were not proper and competent for the defendants to employ.

Applying, therefore, the principles referred to, we think the plaintiff has failed to satisfy us that the defendants undertook personally to superintend and direct the works, or to select proper and competent persons to do so, or to furnish them with adequate materials or suitable means and resources for the work, and that therefore the rule must be made absolute to enter a nonsuit or verdict for the defendants.

Rule absolute.

Solicitor for plaintiff: *W. Scott Fox.*

Solicitors for defendants: *Hargrove, Fowler, & Blunt.*

(1) Law Rep. 1 H. L., Sc. 326.

[IN THE COURT OF APPEAL.]

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May 16.

DAWSON AND OTHERS *v.* LORD OTHO FITZGERALD.

Arbitration Clause—Construction of Covenants—Covenant to pay Compensation, the Amount to be referred to Arbitration—Collateral and distinct Covenants.

A lessee covenanted with the lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injury, and had neglected to pay any compensation:—

Held, reversing the judgment of the Court below, that upon the true construction of the lease the covenant to refer the amount of compensation was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration.

THE first count of the declaration alleged that the plaintiffs demised to the defendant a messuage and lands called West Park, with liberty of shooting, hunting, &c., over certain manors, upon certain terms. The lease itself was referred to during the argument, and the covenants material to this case were that the lessee "will at all times during the continuance of the term keep, or cause to be kept or encouraged, such a number only of hares and rabbits upon the manors as will do no injury to the trees, woods, underwoods, and plantations belonging to the lessors or to their growing crops, or to the growing crops of any of their tenants or farmers; and that in case the lessee shall keep or encourage such a number of hares and rabbits upon the manors as shall injure the trees, &c., belonging to the lessors or their growing crops, or the growing crops of any of their tenants or farmers, the lessee will pay to the lessors or their tenants or farmers a fair and reasonable compensation for such injury, the amount of such compensation in case of difference to be referred to the arbitration of two arbitrators, one to be chosen by the lessors and the other by the lessee, the arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such

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arbitrators or umpire to be binding and conclusive on the lessors and the lessee."

The count set out the above covenants down to and including the words "fair and reasonable compensation for such injury," omitting the rest; and then averred that all conditions were performed, &c., yet the defendant did not during his tenancy keep, or cause to be kept or encouraged such a number only of hares and rabbits upon the manors as would do no injury to the trees, &c., belonging to the plaintiffs or to their growing crops, or to the growing crops of any of their tenants or farmers, but kept such a number as did great injury to such trees, &c., and growing crops respectively, and although frequently requested so to do, the defendant would not pay to the plaintiffs or their tenants or farmers, or any of them, a fair and reasonable or any compensation for such injury. The count also contained breaches of other covenants not now in question.

Plea—to so much of the first count as alleged that the defendant kept such a number of hares and rabbits on the manors as did injury to the trees, &c., and growing crops, and would not pay the plaintiffs or their tenants or farmers, or any of them, compensation for such injury—that one of the terms of the said tenancy was, that in case any such injury should be done by the defendant he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant; that a difference arose between the plaintiffs and the defendant as to the amount of the compensation in the declaration claimed, and that no arbitrators had ever been appointed, nor had the defendant been requested by the plaintiffs to appoint an arbitrator, nor had an award ever been made deciding the amount of the compensation according to the terms of the tenancy.

Demurrer to the plea and joinder therein.

On the 22nd of November, 1873, the Court of Exchequer

(Kelly, C.B., and Pigott, B., Bramwell, B., dissenting) held the plea good, and gave judgment for the defendant. (1) From this judgment the plaintiffs appealed.

Kingdon, Q.C., and *Arthur Charles*, for the plaintiffs, relied on the reasoning in the judgment of Bramwell, B., in the Court below, and cited *Roper* v. *Lendon* (2) (where the agreement to refer was in similar terms) as an authority in favour of the plaintiffs.

Manisty, Q.C., and *R. E. Turner*, for the defendant. The question is simply one of construction of the terms of the covenant. The declaration sets out the covenant imperfectly and unfairly, and the omission is supplied by the plea. The words used shew the intention of the parties that no action should be brought until after arbitration. Such an intention may appear by any form of words; it is not necessary that the recourse to arbitration should (as in *Scott* v. *Avery* (3)) be in terms expressed to be a condition precedent to the right of action: *Braunstein* v. *Accidental Death Insurance Co.* (4) The covenant is really to pay such amount of compensation as the arbitrators or umpire shall find to be due, as in *Elliott* v. *Royal Exchange Assurance Co.* (5)

[JESSEL, M.R. The declaration alleges a breach of the covenant to keep such a number only of hares and rabbits as would do no injury; and a second breach that the defendant kept such a number as did injury, but paid no compensation. The plea is at all events no answer to the first breach, and on that ground alone the plaintiffs are entitled to judgment, as pointed out by Bramwell, B. (6)]

The whole of the passage in the lease relating to hares and rabbits must be read as one covenant, and the count as containing one breach only.

JESSEL, M.R. The question is, whether the judgment of the majority of the Court below is right, or the opinion of Baron

(1) Law Rep. 9 Ex. 7.
(2) 1 E. & E. 825; 28 L. J. (Q.B.) 260. 5 Jur. N.S. 491.
(3) 5 H. L. C. 811; 25 L. J. (Ex.) 308. 2 Jur. N.S. 815.
(4) 1 B. & S. 782; 31 L. J. (Q.B.) 17. 6 Jur. N.S. 506
(5) Law Rep. 2 Ex. 237.
(6) Law Rep. 9 Ex. at p. 11.

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Bramwell, who differed from them. I take the law as settled by the highest authority—the House of Lords—to be this:—There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under s. 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration, in which case a judge has power to prevent the case going to a jury, if the arbitration can be fairly enforced. A lessee may have entered into two collateral covenants of this kind, relying on the provisions of the legislature that in cases where an arbitration can go on, it is open to him to apply to a judge to stay the action on proper terms. It is not unreasonable to suppose that the defendant relied on this when he entered into these two collateral covenants, and there is no necessity to read the words otherwise. Properly construed, they are two covenants, and not one. It would be mere repetition to say more after Baron Bramwell's judgment, in which I entirely concur.

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LORD COLERIDGE, C.J. I agree that the decision of the Court below should be reversed, and substantially for the reasons given in my Brother Bramwell's judgment, and I do so on the authority of the principles laid down in *Scott* v. *Avery*. (1) The correct view of *Scott* v. *Avery* (1) is well stated in my Brother Bramwell's judgment in *Elliott* v. *Royal Exchange Assurance Co.* (2) to be this: "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308. (2) Law Rep. 2 Ex. at p. 245.

2 Jur N.S. 815.

shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott* v. *Avery*." (1) That passage states clearly two classes, under one or other of which covenants may fall. I think the present case falls under the former class, and not the latter, and that the judgment below ought therefore to be reversed.

POLLOCK, B. I am of the same opinion. The principle is well laid down by my Brother Bramwell during the argument in *Tredwen* v. *Holman* (2): "If a tenant covenants that he will cultivate the demised land in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may, nevertheless, be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them."

Judgment reversed and entered for the plaintiffs.

Solicitor for plaintiffs: *P. A. Hanrott.*

Solicitors for defendant: *Markby, Wilde, & Burra.*

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 1 H. & C. at p. 79.

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May 10.

LLOYD'S BANKING COMPANY *v.* OGLE.

Specially indorsed Writ—Leave to defend—Surety or Guarantor—Judicature Acts, Order III., Rule 6 ; *Order XIV., Rules* 1, 6.

The power given by Order XIV., Rule 1, to a Court or judge, where the defendant has appeared to a specially indorsed writ of summons, to allow the plaintiff to sign final judgment, is intended to be exercised where it is shewn, either from the acknowledgment of the debt by the defendant or from other circumstances, that the defence would be for mere purposes of delay.

In an action against a surety on a specially indorsed writ it was not shewn that the debt had been acknowledged by the principal debtor, or that particulars had been furnished to the defendant, or that he had admitted his liability :—

Held, that the defendant might reasonably call on the plaintiff to prove his claim, and should be allowed to defend without paying money into court or giving security.

This was an application to rescind or vary an order made by a judge at chambers (confirming a master's order), that the plaintiffs should be at liberty to sign final judgment for the amount indorsed on the writ of summons, unless the defendant should pay the money into court or give security for the amount.

The writ in the action was specially indorsed under Order III., Rule 6, as follows:—"The plaintiffs' claim is for 6000*l.* and interest under a continuing guarantee not to exceed 6000*l.* and interest thereon at 5 per cent. per annum, for the banking account of Hockley Hall Collieries, Limited, with the plaintiffs."

The defendant appeared to this writ, and the plaintiffs, proceeding under Order XIV., Rule 1, verified their cause of action by an affidavit of the general manager, in which it was sworn that the sum of 6000*l.* secured by the guarantee was owing from the defendant, the Hockley Hall Collieries, Limited, being in default to that amount, and they called on the defendant to shew cause why they should not be at liberty to sign final judgment. The defendant opposed the application, and stated in his affidavit that he had formerly been a director of the Hockley Hall Collieries, Limited, but had ceased to be so when the writ was issued; that he was aware that there was a running account between that company and the plaintiffs; but that he was unable to ascertain whether anything was due on the guarantee, and believed that nothing was

due; that he was one of several co-guarantors; and that he had not received any statement of account from the plaintiffs, shewing the particulars of their claim against the Hockley Hall Collieries, Limited, or of the claim against himself under the guarantee. The order having been made,

J. Brown, Q.C. (*Trevelyan* with him), applied to rescind it. He contended that Order XIV., Rule 1, was intended to apply to the case of a principal debtor, and not to that of a surety who has not the means of knowing how the matter stands between the plaintiff and the principal debtor. The order to pay into court, or find security for this large sum, might prevent the defendant from defending and ascertaining what is really due, or taking advantage of anything that may have altered his position with regard to the plaintiffs. Further, in this case the plaintiffs have the security of the other guarantors.

H. Matthews, Q.C., and *Archibald*, shewed cause. The matter is one of discretion for the judge, and Order XIV., Rule 6, gives power to allow a defendant to defend unconditionally or subject to such terms, as to giving security or otherwise, as the Court or a judge shall think fit. This Court will not review the discretion exercised except a strong case is shewn: *Golding* v. *Wharton Salt-works Co.* (1) The defendant, who has had the whole time between the writ and the present time in which to make inquiries as to the debt due from the collieries company, does not shew that he has applied to the plaintiffs for particulars.

J. Brown, Q.C., in reply.

BRAMWELL, B. I am of opinion that this rule should be made absolute. I should have some hesitation in such a matter in overruling the order of a judge at chambers, but I have had an opportunity of consulting four of the judges of the Common Pleas Division, and they are of the same opinion as myself. Had this matter come before me in the first instance, I think I may say that I should not have made this order, for the power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to

(1) 1 Q. B. D. 374.

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cases in which the defendant might reasonably say, "I do not know if your case is well founded or not, but I require you to prove it." I by no means say that under no circumstances, in an action on a guarantee, could security be required, because it is quite possible to imagine a case in which the defendant might only put in a plea for the purpose of delay, knowing his indebtedness, and having acknowledged it. If the plaintiffs had sworn that the debt had been admitted by the company, and that the defendant had been informed of the amount, and had not dissented or in any other way denied his liability, it would seem to me that he could only defend the action for the purpose of delay, and such an order as that appealed against might be made; but where a guarantor bonâ fide says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him. It is said that this right is not taken away here, because the defendant may bring the money into court or give security for it; but those conditions practically may take away the power to defend, and they should only be applied when there is something suspicious in the defendant's mode of presenting his case. In this case the debt is secured by the guarantees of five other persons, and on the one hand the plaintiffs have not shewn that they sent any account to the defendant, or that the debt was acknowledged by the company, though, on the other hand, the defendant has not shewn that he made any application for particulars of the claim, or that the company are not satisfied that they are indebted in the amount claimed. In my opinion, it ought to be a general rule that, where there is no acknowledgment of the debt by the defendant, or anything else to shew that the defence is for mere purposes of delay, in the case of a guarantor or surety like the defendant, he should not be prevented from going to trial. The case is like that of a defendant, under Keating's Act, applying for leave to defend in an action on a bill of exchange on which he is sued as guarantor, in which case, according to the practice, he would have been admitted to defend. For these reasons I think the order should be set aside.

CLEASBY, B. My impression would have been that, if a man

induces a banker to advance money by giving a guarantee, then, on affidavit by the manager that the sum is due, a defendant setting up no defence should be called on to give security when he can say no more than that he does not know of his indebtedness. Still, in a matter of this sort, where uniformity is desirable, I give way to the authority of so many.

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Rule absolute.

Solicitors for plaintiffs: *Tucker & Lake.*
Solicitors for defendant: *Elmslie, Forsyth, & Sedgwick.*

[IN THE COURT OF APPEAL.]

June 16.

WOOLER AND WIFE *v.* KNOTT.

Landlord and Tenant—Covenant not to do or permit any Act that can or may affect, lessen, or make void Public-house Licences—Conviction of Lessee—Forfeiture—Licensing Acts, 1872 *and* 1874 (35 *&* 36 *Vict. c.* 94, *and* 37 *&* 38 *Vict. c.* 49.]

By a lease of a public-house made after the Licensing Act, 1874, came into operation, the lessee covenanted not to "do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the public-house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day three offences against the Licensing Acts of 1872 and 1874, was convicted of two of them by justices, who directed, under the Act of 1874, s. 13, that the convictions should not be recorded on any of the lessee's licences. The lessor having brought an action against the lessee to recover possession of the public-house on the ground of forfeiture, and for damages for breach of covenant:—

Held, affirming the judgment of the Exchequer Division, that the licences were not "affected" within the meaning of the covenant, and that there was no breach of covenant.

APPEAL from a judgment of the Exchequer Division in favour of the defendant upon demurrer. (1)

M. Lloyd, Q.C., and *W. Willis*, for the plaintiffs, appellants. The judgment of the Court below gives no effect to the words "can or may," but reads the covenant as if it were "any act that

(1) Ante, p. 124, where the pleadings are set out.

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affects, lessens, or makes void." Some meaning must be attached to the words "can or may;" they will fairly include that which makes the avoidance of the licence imminent, and beyond the power of the lessee to prevent. The lessee committed on the same day three offences against the Licensing Acts, and was convicted of two of them. If the justices had thought proper, they might have directed the two convictions to be recorded on the licence, and then convicted her of the third offence—that of being herself drunk in the public-house—under s. 12 of the Act of 1872; and then the licence would have been ipso facto void under s. 30 of the Act of 1872. When the offences were once committed, nothing that the lessee might do could prevent the avoidance of the licence. It entirely depended on the justices. If this is not something "which can or may affect" the licence, what application can those words have? The line must be drawn somewhere. If nothing but what "makes void" the licence is a breach of the covenant, no meaning is given to "affect" or "lessen." The Court below was influenced by the fact that, whereas by the Act of 1872, ss. 13 and 24, these two offences must have been indorsed on the licence, s. 13 of the Act of 1874 left the indorsement to the discretion of the justices. That alteration in the law cannot alter the meaning of this covenant, which is copied verbatim from a former lease of these premises, granted in 1867. This explains the expression "any of the licences." Under the present law one magistrates' licence and one excise licence are sufficient. Moreover, s. 55 of the Act of 1872 is not repealed, subs. 3 of which requires the particulars of any conviction to be entered in the register of licences; and by s. 13 of the Act of 1874, the justices, before passing sentence, must inspect that register. In granting renewals of licences (32 & 33 Vict. c. 27, ss. 4–8), the justices may take into account the general conduct of the house; their powers and discretion are expressly reserved by s. 42 of the Act of 1872. It is impossible to suppose that two convictions entered on the register would not influence their decision, and so "affect the licence." This licence was, at all events, "lessened," i.e. diminished, in value.

[For the rest of their argument, it is sufficient to refer to pp. 126–7, ante.]

Cave, Q.C., and *J. C. Heath*, for the defendant, were not heard.

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JAMES, L.J. I think the Exchequer Division put the true construction on this covenant. It has been argued here, as it was below, that the covenant is equivalent to a covenant that the lessee will not commit any offence against the Licensing Acts. If the parties had intended that, it would have been easy to say, "The lessee shall not commit any offence against the laws for the time being in force concerning public-houses," or some such words. No such words are used, but instead the parties put in words which regard the forfeiture of the licence itself. The committing of an offence which, under certain circumstances—i.e. if followed by a conviction, and that a recorded conviction, and again by a second recorded conviction and by a third conviction—will result in the loss of the licence, is not an act which "may or can affect, lessen, or make void" the licence. It is not to be presumed that a person is going to commit other offences. It would be straining words to say that an inchoate act, which may influence the mind of the justices on some future occasion and induce them to order a conviction to be recorded, is of itself an act which affects, lessens, or makes void the licence. A conviction does not by itself affect the lessor's interest. If the lessor thinks fit, he can express in plain words that an offence or a conviction shall cause a forfeiture of the lease.

MELLISH, L.J. I am of the same opinion. If the justices had ordered the two convictions to be indorsed on the licence, I think the licence would have been affected within the meaning of the clause, because if the tenant was convicted of another offence the licence would necessarily be forfeited, and the landlord would run the risk of its never being renewed. Whether the licence would have been "affected" if one conviction only had been indorsed on it, so as to require a second conviction to be indorsed and a third conviction to happen before the licence could be forfeited, I have some doubt, and I give no opinion. But I am clear that if no conviction has been recorded on the licence nothing has been done which "can or may affect, lessen, or make void the licence." It cannot be meant that every offence of which a person may be convicted, and which may be indorsed upon the conviction, should work a forfeiture of the lease. The covenant is not simply that

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the lessee will not himself do or omit any act, but that he will not permit or suffer to be done any act by other persons.

As to the other argument, that the tenant having been convicted the covenant is broken, because the licence is in danger of not being renewed, this is a covenant that the tenant will not do anything—not to affect a renewal, but—to affect the existing licences.

BAGGALLAY, J.A. I am of the same opinion. It is impossible to say that any conviction not indorsed on the licence can affect the licence. Nothing could have been easier than to say that any conviction should of itself work a forfeiture of the lease, if that result had been intended.

QUAIN, J. I quite concur that nothing has been done which could or might affect the licence. What was done affected the character of the licensed person, not the licence itself. This is a covenant intended to protect the interest of the landlord in licensed premises to let or dispose of. There being no indorsement on the licence it is as good and valid as if the tenant had never been convicted. It is not void, and stands utterly unaffected. If it had been indorsed with even one conviction, I think a serious question would have arisen whether the licence itself was affected, but since it has not, it is in the same position as if there had been no conviction.

To the argument that the licence is affected because it is not so likely to be renewed, the answer is complete. The covenant says nothing about renewal, but touches only "any of the licences *for the time being* granted."

Judgment for the defendant affirmed.

Solicitor for plaintiffs: *O. B. Wooler.*

Solicitors for defendant: *Iliffe & Co., for Barron, Darlington.*

ROSS AND ANOTHER *v.* RUGGE-PRICE. 1876 *Feb.* 17.

Statutory Duty—Duty to be enforced by Injunction—Remedy by Action for Injury sustained by Breach—Forest of Dean Act, 1 & 2 *Vict.* c. 43, *s.* 29.

The statute 1 & 2 Vict. c. 43, and the rules made under it, regulate the use of adjoining mines in the Forest of Dean. By s. 29, compliance with the rules may be enforced by injunction of the Court of Exchequer, or otherwise in such manner as that Court shall on application think fit. The plaintiffs and the defendant were holders of adjoining mines, and the former brought an action for injury sustained by them through the stopping of the engines in the defendant's mine contrary to one of the rules. On demurrer:—

Held, that the specific remedy provided by s. 29 for enforcing the rules did not exclude the right of action for injuries caused by a breach of them.

STATEMENT of claim:—

1. At the time of the wrongs hereinafter mentioned, the plaintiffs were possessed of a colliery called the Princess Royal Colliery, in the hundred of St. Briavels, in the county of Gloucester, and the defendant was owner and in possession of a colliery called the Flour Mill Colliery in the same parish.

2. Both the collieries were gales subject to the statute 1 & 2 Vict. c. 43, and the rules and regulations made under and in pursuance of the statute, and were held and worked by the plaintiffs and the defendant respectively, under grants thereof made by virtue of the statute and the rules and regulations.

3. The Flour Mill Colliery adjoined, and was on the land side of, the Princess Royal Colliery, and was drained by steam-engines.

4. By No. 19 of the rules and regulations, it is provided that "in all cases where gales lying on the land side of other gales are drained by steam-engines, and when by the stopping of those engines the water may be thrown into dip gales, the galees of the land collieries shall be bound to work their engine or engines so as to prevent any of the water of these gales from falling down into the dip gales so long as they shall continue to hold possession of such land gales."

5. For some time previous to December, 1874, both the collieries had been worked aud drained by the plaintiffs and the defendant respectively according to the statute and rules and regulations, but in that month the defendant stopped the steam-

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engines by which the Flour Mill Colliery was drained, by reason whereof the water accumulated in the land gale of the Flour Mill Colliery, and fell down into the deep gale of the Princess Royal Colliery, and flooded the same, and injured and destroyed the plaintiffs' works, plant, and machinery therein, and the plaintiffs were for a long time prevented from further working the same, and lost the profits which they would otherwise have obtained by working the same.

Demurrer.

Prentice, Q.C. (*J. Digby* with him), for the defendant. The remedy for breach of the rules is provided by s. 29 of the Act 1 & 2 Vict. c. 43, and therefore the right of action is excluded. By that section the Crown is empowered to evict for non-compliance with the rules, and by the final clause of the same section the rules may be enforced "by and on behalf of Her Majesty, her heirs or successors, or by any other person or persons by injunction of Her Majesty's Court of Exchequer, or otherwise, in such manner as the said Court shall, on application, think fit." The obligation on the plaintiffs to work the engines is not absolute, and therefore the defendant ought to shew notice by him to the plaintiffs of the injurious consequences of the stoppage: *London and South Western Ry. Co.* v. *Flower.* (1) Further, these rules were not made for the benefit of individuals, but of the Crown.

[Bramwell, B. The 29th section and rule 3, which relates to the user of roads and railways by all persons holding gales, as well as other rules, shew clearly that it was intended to give private rights to the parties who would be benefitted by their observance.]

Cohen, Q.C., and *Anstie*, for the plaintiffs. Unless there are distinct words in the statute giving a remedy for the injury the plaintiffs have sustained, the common law remedy is not taken away: *Anonymous* (2); *Vestry of St. Pancras* v. *Batterbury* (3); *Couch* v. *Steel* (4); *Shepherd* v. *Hills* (5); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (6); and *Gorris* v. *Scott* (7)

(1) 1 C. P. D. 77.
(2) 6 Mod. 27.
(3) 2 C. B. (N.S.) 477; 26 L. J. (C.P.) 243.
(4) 3 E. & B. 402; 23 L. J. (Q.B.) 121.
(5) 11 Ex. 55.
(6) Law Rep. 6 Ex. 404.
(7) Law Rep. 9 Ex. 125.

Prentice, Q.C., in reply.

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Bramwell, B. I am of opinion that our judgment should be for the plaintiffs. The plaintiffs' case is put very simply in this way, that an Act of Parliament has authorized the making of certain rules, that those rules have been made, that they are therefore as though they were contained in the Act of Parliament and have similar efficacy; that they give a private right to the plaintiffs, that that private right is infringed, and then, by the general law of the land, they are entitled to bring their action on the case, as it used to be called, against the defendant for that infringement. Now Mr. Prentice does not deny any of the general propositions contained in that argument, but what he says is, that the remedy is either by eviction or by application to the Court of Exchequer, and he relied on the well-known principle of law, which is abundantly illustrated by the cases that have been cited, that where a right is conferred by a statute, and a remedy for the violation of that right is enacted by the same statute, that is the only remedy, and you can have no other. That proposition of law is not in dispute, but how is it applicable to this case? What the statute here says is, that compliance with the rules may be enforced by application to Her Majesty's Court of Exchequer. Now it may very well be that if an application were made to any other Court for an injunction, or something in the nature of an injunction, it would be said, "No, the statute which gave these rights has enacted that if you want to enforce compliance with them you must go to the Court of Exchequer." This is not an application for an injunction, and it is not indeed an application to compel compliance with the rules; but it is an action brought to recover damages for the previously broken rules.

Now it cannot, to my mind, be said that the statute did not intend that there should be some remedy for the damage sustained. Just see what the consequence would be. By rule 8, the defendant in this action should not have given up his gale, nor have discontinued the working of the engine, without a previous three months' notice to the plaintiffs. He, however, did not give the notice, but left the place altogether; and the result was, that

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in three months the mine was drowned. How can a person in the situation of the plaintiffs come to the Court of Exchequer, supposing it to be sitting, to enforce compliance with that rule, he having sustained three months' damage in the meanwhile? There is no doubt in my mind, looking at the words of s. 29, that it does not give any remedy for damages sustained by an antecedent breach of the duty imposed on persons by these rules and regulations.

Therefore I think that we are bound to hold this to be a case in which a private right is given to the plaintiffs, and that private right having been infringed by the defendant, and there being no statutory provision for a remedy to the plaintiffs, they are entitled to have recourse to the common law upon the authority of the cases that have been cited.

I come now to another point. It is said that notice to the defendant ought to be shewn of a state of things from which damage would arise. Let us see how far that is probable. A person in the situation of the plaintiffs cannot possibly know that things are going to be done which would cause damage to him. He does not know the state of water in the upper mine, and he does not know what extent of pumping the owner of the gale within the upper mine is using, and he cannot form an opinion as to how far he is likely to be damaged or not. Now I do not say that the owner of the upper mines must know, because peradventure he may not know; but when we are considering what interpretation we ought to put on a general rule, it is all important to shew that one state of things is eminently likely to exist with reference to the defendant, when the opposite exists with reference to the plaintiffs. That is to say, it is most probable that the owner of the upper mine will know the coming mischief, and that the owner of the lower mine will not; and therefore it will be a safe rule to say that in all cases the owner of the upper mine shall do it at his peril. I find nothing in the Act of Parliament or in the rules which shews that he shall do it upon notice; but it says absolutely, he shall do it, and therefore he has not performed that statutory duty. I therefore come to this conclusion, that here is a statutory right, or a right in the nature of, and of equal efficacy with, a statutory right, given to the plaintiffs for their personal

benefit; that it has been infringed by the defendant; that it is not necessary that that infringement should be done wilfully or knowingly; and that, inasmuch as it has been infringed by the defendant, and no remedy is given to the plaintiffs for the infringement in this statute or the rules which create that right, they are entitled to have recourse to the common law, and bring their action on the case in respect of it. I am therefore of opinion that our judgment should be for the plaintiffs.

Amphlett, B. I am of the same opinion. I considered throughout that it was rather extraordinary that, when the legislature were providing for the management of these gales, they should not have given some remedy for breach of the rules by which one of the holders of a gale might be injured. I have looked, therefore, with some attention through the statute and also to the rules to see whether any remedy is given for damage that would accrue to the owner of the gale lying in the dip from a breach of the rules by the galees on the land side, but I am unable to find any.

There is a remedy given both to the Crown and to the public with a view to preventing the continuance of any injury, or the creation of any injury; but it is clear that the application to the Court of Exchequer would not have enabled that Court to give any remedy for past injury of any kind. These rules, which were for the security of gale owners, really would be traps if there were no remedy given for past damage, because a person who was working at a lower level, relying on these rules, finding his neighbour working by steam-engine, and seeing, according to rule 19, that where that is the case the steam-engine cannot be discontinued so as to injure him, would have no engines at hand to save himself from the flooding which would happen probably in the course of a few days, long before he could get any injunction from the Court of Exchequer. If that is the case, then we are driven to that general principle of law which is not disputed, that, unless you find some remedy given in the statute where a benefit is given to an individual, or find in the statute clearly that it was not intended to give him any such remedy, the law there implies that he may have his common-law remedy. I do not know any case in which this is more forcibly put, and where the circumstances are so

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like the present, as the case of *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) because there the corporation had established waterworks and were obliged to have plugs and other apparatus to guard against fire. They neglected that duty, which was a public duty, for breach of which there were specific penalties to be recovered by a common informer, and the question was whether a man who had his house burnt down and suffered private injury, could have a remedy. The arguments used by Mr. Prentice were made use of in that case, and I find my Brother Bramwell laid down the law thus: "When a duty is imposed on a person it always supposes a correlative right in some one, either in the public or in the individual. When it is the public, the remedy is usually by indictment; but when the remedy is imposed for the benefit of the individual, then, unless some peculiar and specific remedy is given to him by the same statute which creates his right, it seems to follow that he has the ordinary remedy by action. Is, then, this duty created in such a way as to confer the correlative right upon the public or on the individual? It is manifest that it is created in such a way as to confer the right not upon any section of the public but upon the individual. The public at large are not interested in extinguishing fires in the houses of individuals, but the individual is. Therefore it seems to me to follow, that unless some compensation is given to him for the violation of his right he is entitled to maintain an action at common law. Mr. Holker could not help admitting that although a common informer (which, as it includes all mankind, must include the sufferer) might have recovered a penalty of 10*l.*, yet there is not in the statute any compensation given to the sufferer whose right to the water for the extinguishment of fire on his premises has been infringed. If so, then the ordinary right of action exists." In the present case, although you find in the statute that there is a definite provision for the purposes of prevention, you really find that there is no machinery and no compensation given in any way for past damage. Past damage has accrued. It appears to me to follow that the plaintiffs ought to have, and are able to maintain, their right of action as they have done in this case. I think, therefore, the judgment ought to be for the plaintiffs.

(1) Law Rep. 6 Ex. 404.

HUDDLESTON, B. I am of the same opinion. I think it is desirable to consider for a moment for what purpose the Act was passed. We perfectly well know that before the year 1838 there were certain individuals who had acquired, as they contended, rights in the Forest of Dean with reference to the working of both iron and coal mines; and there were very curious customs with reference to the working of the mines, and those customs were settled at a place called the Speech House in the Forest of Dean, where they declared what should be their different customs and different rights. The 1 & 2 Vict. c. 43 was passed, and gave certain powers to certain galees, and the recital of that Act is not unimportant to look at, because it recites that the alleged uses and customs are uncertain and undefined, and are in many respects inapplicable to the present mining operations of the country. Then the statute goes on to enable the commissioners to make certain rules, and those are to be, according to s. 24, general rules and regulations under and subject to which the mines, minerals, and quarries shall be worked and gotten. Then s. 29 says, that if any person wilfully proceeds in opening or working a gale, pit, level, work, or quarry contrary to the rules, that is to operate as a forfeiture. Then power is given in addition to enforce compliance with the rules by proceeding in the Court of Exchequer; and the 31st section declares that all customs hitherto existing shall cease. Therefore this Act, with the rules, declares what are the duties of the different persons, the miners and others; and the rules are clearly to be considered part of the Act, because the 24 & 25 Vict. c. 40, recites that three awards which were made on the 8th of March, the 20th of July, and the 24th of July, are to be read as part of the Act, and they are also recognized in a subsequent Act of Parliament which has reference to the Forest of Dean, the 34 & 35 Vict. c. 85, which was passed for the purpose of correcting two of the rules made by the commissioners which were held to be inapplicable. That being so, what is the duty imposed? By rule 19 there is a duty imposed upon the galees of the land gales, and the galees of the deep gales. The galees of the land gales are divided into two classes, those who use steam-engines and those who do not. The duty imposed on a man who uses a steam-engine is this, that if he uses the steam-engine he

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must continue to use it as long as he holds possession of those land gales. By the same rule, if he does not use a steam-engine, he is only liable where he wilfully or negligently suffers the water to fall down into the deep gale, and the duty imposed on the deep galee is to take care that his water does not rise to such a height as would injure the property of the land galee. Those are the duties laid down, and there is no provision with reference to compensation, or to the power of obtaining damages.

I find in the case of *Gorris* v. *Scott* (1) the rule applicable to this case very clearly explained by the Lord Chief Baron in his judgment thus: "Although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; if, therefore, by reason of the precautions in question not having been taken, the plaintiffs have sustained that damage against which it was intended to secure them, an action would lie."

This rule would entitle the plaintiffs in this case to maintain their action. I am therefore of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Solictor for plaintiffs: *H. P. Cobb.*

Solicitors for defendant: *Clabon & Fearon.*

(1) Law Rep. 9 Ex. 125.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

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May 27.

WILLIAMS, APPELLANT; EVANS, RESPONDENT.

Statute, Construction of—Intention of Legislature—Offence created, Penalty omitted—Jurisdiction of Justices—"Rider"—"Driver"—5 & 6 *Wm.* 4, *c.* 50. *s.* 78.

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 78, "If any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger, every person so offending . . . . and being convicted of any such offence . . . . before any two justices of the peace shall . . . . for every such offence forfeit any sum not exceeding 5*l.* in case such driver shall not be the owner of such waggon, cart, or other carriage, and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*"

The appellant was convicted by justices of furiously riding on the back of a horse along a highway, and a penalty of 1*l.* was imposed upon him:—

Held, that although the word "rider" was not mentioned in the penal clause of the section, the justices had jurisdiction to convict the appellant, and that the respondent was entitled to the judgment of this Court.

CASE stated by justices of the peace for the county of Denbigh, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent charging that the appellant "did ride a horse furiously on a certain highway there situate, leading from Denbigh to Llandyrnog, so as then to endanger the lives and limbs of passengers on the said highway."

Upon the hearing of the information it was proved that the appellant did ride a cart-horse furiously, he being on the back of such horse without saddle, and urging the same forward on the highway in question so as to endanger the lives and limbs of passengers thereon.

It was contended on the part of the appellant that the justices had no power to impose a penalty or convict for riding furiously, as the penal part of s. 78 of 5 & 6 Wm. 4, c. 50, omitted all mention of a rider.

The justices convicted the appellant, and adjudged him to forfeit and pay 1*l.*

The question of law for the opinion of the Court was, whether a person on a horse, and urging the animal furiously forward on

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the highway, to the danger of passengers, is liable to be convicted and fined under the 78th section of 5 & 6 Wm. 4, c. 50.

W. C. Yale, for the appellant. The conviction was wrong; the justices had no jurisdiction under 5 & 6 Wm. 4, c. 50, s. 78 (1) to

(1) By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 78, it is enacted as follows:—

"If the driver of any waggon, cart, or other carriage of any kind, shall ride upon any such carriage, or upon any horse or horses drawing the same on any highway, not having some other person on foot or on horseback to guide the same (such carriages and carts as are driven with reins and are conducted by some person holding the reins of all the horses drawing the same, excepted); or if the driver of any carriage whatsoever on any part of any highway shall by negligence or wilful misbehaviour, cause any hurt or damage to any person, horse, cattle, or goods conveyed in any carriage, passing or being upon such highway, or shall quit the same and go on the other side of the hedge or fence inclosing the same, or negligently or wilfully be at such distance from such carriage, or in such a situation whilst it shall be passing upon such highway, that he cannot have the direction and government of the horses or cattle drawing the same, or shall leave any cart or carriage on such highway so as to obstruct the passage thereof, or if any person shall drive or act as the driver of any waggon, cart, or other such carriage, not having the owner's name as hereby required painted and remaining legible thereon, and shall refuse to tell or to discover the true christian and surname of the owner, or principal owners, of such waggon, cart, or carriage, or if the driver of any waggon, cart, or other carriage, whatsoever, or of any horses, mules, or other beasts of draught or burthen, meeting any other waggon, cart, or other carriage, or horses, mules, or other beasts of burthen, shall not keep his waggon, cart, or carriage, or horses, mules, or other beasts of burthen, on the left or near side of the road; or if any person shall in any manner wilfully prevent any other person from passing him, or any waggon, cart, or other carriage, or horses, mules, or other beasts of burthen under his care, upon such highway, or by negligence or misbehaviour prevent, hinder, or interrupt the free passage of any person, waggon, cart, or other carriage, or horses, mules, or other beasts of burthen, on any highway, or shall not keep his waggon, cart, or other carriage, horses, mules, or other beasts of burthen, on the left or near side of the road for the purpose of allowing such passage; or if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger; every person so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice, or by the oath of one or more credible witnesses, before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding five pounds in case such driver shall not be the owner of such waggon, cart, or other carriage, and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding ten pounds, and in either of the said cases shall in default

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determine the charge and punish the appellant, for the word "rider" is not mentioned in the penal clause of the section. It is a penal enactment, and therefore must be construed strictly. Moreover, it has already been decided in a Court of Assize that a person cannot under this enactment be summarily convicted of furiously riding: *Reg.* v. *Bacon* (1); and this Court cannot give judgment for the respondent without overruling that decision. *Underhill* v. *Longridge* (2) strongly supports the contention for the appellant. *Cullen* v. *Trimble* (3) appears at first sight to be in favour of the decision by the justices, but it is in truth quite distinguishable.

[CLEASBY, B. The statute upon which the decision in that case turned was expressed in very different terms from 5 & 6 Wm. 4, c. 50, s. 78. I do not think it an authority against the contention for the appellant.]

If the legislature had intended to comprehend the word "rider" in the word "driver," it would have so enacted in express terms; thus, in 12 & 13 Vict. c. 92, s. 29, the word "over-drive" is made to signify also "over-ride." By 2 & 3 Vict. c. 47, s. 54, the offence of furiously riding within the Metropolitan Police District is rendered punishable; but there the language is clear and precise, and very different from that employed in the statute applicable to the present case. By the construction contended for by the appellant, those provisions of 5 & 6 Wm. 4, c. 50, s. 78, which relate to offences other than those committed by drivers, will not be ren-

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of payment be committed to the common gaol, or house of correction, there to be kept to hard labour for any time not exceeding six calendar weeks, unless such forfeiture shall be sooner paid; and every such driver offending in either of the said cases shall and may, by the authority of this Act, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be conveyed before any justice of the peace to be dealt with according to law; and if any such driver in any of the cases aforesaid shall refuse to discover his name, it shall and may be lawful for the said justice of the peace before whom he shall be taken, or to whom any such complaint shall be made, to commit him to the common gaol or house of correction, there to be kept to hard labour for any time not exceeding three months, or to proceed against him for the penalty aforesaid by a description of his person and the offence only without adding any name or designation, but expressing in the proceedings that he refused to discover his name."

(1) 11 Cox. Cr. Ca. 540; 22 L. T. (N.S.) 627.

(2) 29 L. J. (M.C.) 65.

(3) Law Rep. 7 Q. B. 416.

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dered wholly nugatory: it is a statute which creates the offences, and the rule is, that whoever commits any act contrary to the prohibition of a statute is liable to be punished upon indictment (1); but in the present case the justices have made the mistake of convicting summarily, instead of committing the appellant for trial at quarter sessions or assizes.

The respondent did not appear.

CLEASBY, B. It is impossible, I think, to come to any conclusion upon the effect of this section without some doubt, though it is not likely that the doubts and difficulties of all will be the same. I did at first feel very great hesitation in coming to the conclusion that the statute before us can be deemed to make a person who rides furiously liable to be summarily convicted and to be ordered to pay a penalty. It is a difficulty of a kind which is often encountered in construing Acts of Parliament, and it is necessary to choose between two alternatives: either we must hold that there is a casus omissus, when it is plain that, if the attention of the legislature had been drawn to the faulty language of the section, they would have imposed a penalty upon furious riding in clear terms; or we must so interpret the enactment as to include within its prohibition an act which is not forbidden by the words used in their primary import. Now, I have so much difficulty in arriving at a conclusion, that I feel myself unable to say that either construction would be erroneous; but I find that both my learned Brothers agree in thinking the difficulty not to be insurmountable; and further, I am clearly of opinion that, sitting as members of the High Court of Justice, we are not bound by the decision of a Court of Assize; and as I do not wish to differ from the conclusion of my learned Brethren, I will not say that the conviction was wrong. The enactment is complicated in its terms, and includes many wrongful acts; but the question resolves itself into this, whether the latter words of the penal clause, which refer only to drivers, exclude from its operation every instance where the

(1) As to when an indictment will lie for an act done contrary to the prohibition of a statute, though no penalty be therein imposed, see Archbold's Criminal Pleading, 18th ed. p. 2; 1 Russell on Crimes and Misdemeanours, 4th ed. p. 86; *Queen* v. *Walker*, Law Rep. 10 Q. B. 355.

wrongful act is committed by a person not in charge of a vehicle. I incline to think that the clause may be construed as enacting that a breach of the statute committed by the owner of a waggon, cart, or other carriage, shall be visited with a penalty not exceeding 10*l.*; and a breach committed by any other person shall be punished with a forfeiture not exceeding 5*l.*; and if it is possible to read the enactment in this manner, I am clearly of opinion that it ought to be so construed. Some portions of the section clearly refer to drivers who are not in charge of any waggon, cart, or other carriage, namely, to drivers of "horses, mules, or other beasts of draught or burthen." Now, let me suppose a driver of horses without any kind of carriage to be charged with an offence against the section, and the offence to be established to the satisfaction of the justices hearing the information against him: I do not think that we should be justified in holding that he was not a "driver" within the meaning of the penal clause, and in laying down that he ought to be dismissed unpunished. No doubt that would be a stronger case than the present; nevertheless, the statute clearly constitutes the improper acts specified therein, offences and breaches of the law, for it uses the words "every person so offending in any of the cases aforesaid;" and I cannot say that the construction put upon the section by my learned Brethren is unreasonable. I do not forget that, as a rule, a penal enactment ought to be construed strictly; but I do not think that, by affirming the conviction, this Court will give too wide an interpretation to the language used by the legislature; and certainly, in every other kind of case, the construction adopted by the other members of the Court ought to be followed. For these reasons I express my assent to the conclusion arrived at by my learned Brethren.

GROVE, J. I cannot say that I have no doubt in this case, but I think that as the words which we have before us are contained in a statute, we are entitled to construe them in such a manner as to avoid manifest absurdity; and if we read them literally, a large portion of the section will be, for practical purposes, rendered almost nugatory. I have always understood it to be a rule of

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interpretation applicable to statutes that they are to be construed according to the strict grammatical meaning of the language used, unless such a construction leads to an absurd result (1); and it seems to me that the present case falls within the exception. If we were to decide that by this section a penalty is imposed only upon persons who are drivers of waggons, carts, or other carriages, we should in effect hold that the legislature made the absurd mistake of constituting several offences to be committed by persons other than drivers, and of giving justices jurisdiction to try them, without affixing thereto any punishment. It would be manifestly an absurdity to say that justices should have power to investigate and determine the charge, and yet should have no power to inflict a penalty. If the legislature had stopped at the words "for every such offence forfeit any sum not exceeding 5*l.*," the matter would be clear; the difficulty is caused by the subsequent words; the argument on behalf of the appellant, for practical purposes, expunges from the section everything except what relates to drivers of vehicles. I cannot read the statute literally, but I think it must be construed as enacting that where the offender is the owner of a waggon or other vehicle by means of which the law is broken he is liable to forfeit a penalty not exceeding 10*l.*, and that an offender of any other kind against the statute is not to be fined more than 5*l.* The reason for the distinction probably was that the owner of a waggon, cart, or other carriage is usually in more affluent circumstances than an ordinary driver. No doubt a further difficulty arises from the provisions at the end of the section as to arresting a driver acting in contravention of the statute and as to proceeding against a driver who refuses to disclose his name; it is difficult to understand why these provisions should not apply to other offenders against the statute; but, on the other hand, the legislature may have seen fit, for reasons satisfactory to themselves, to confine the operation of these provisions to drivers properly so called.

I may mention another view which it is not, perhaps, necessary to adopt in the decision of this case, but which, nevertheless, supports our judgment. In this section the word "driver" is

(1) See the judgment of Grove, J., in *Ruther* v. *Harris*, ante, p. 100.

plainly used in an extended sense, for it includes drivers of "horses, mules, or other beasts of draught or burthen;" and therefore it may have been intended by the legislatute that the word "driver" shall include "rider," because a person riding must "drive," that is, guide or conduct the horse. The word "drive" is sometimes popularly used in this sense; and it is applied to a rider at the beginning of this very section, where it provides that, "if the driver of any waggon, cart, or other carriage of any kind shall ride . . . upon any horse or horses drawing the same" without the means of proper control, he shall commit an offence against the Act; it is also applied to the person who ought to be in charge of the vehicle, but who quits it and goes to the other side of the hedge. I therefore think it would not be an extravagant construction to hold that in the latter part of the penal clause "driver" means a person guiding or conducting, and therefore a "rider;" and in that case the enactment would be tolerably clear. But it is unnecessary to decide the case on this ground; for, as I have already stated, the true view of the statute seems to me to be that a fine is to be imposed upon an offender in every case; and if he is not the owner of a waggon, cart, or other carriage he is to be fined a sum not exceeding 5*l.*, but if he is such owner then he is to be fined a sum not exceeding 10*l.*

I may remark that we might have been compelled to decide in favour of the appellant, if the words had been, "No person shall ride or drive furiously, and in case he drives furiously he shall be fined by justices;" for in such case there would be a statutory prohibition apart from the penal clause; but in this section the prohibition is to be inferred only from the creation of an offence punishable before justices. I therefore think that the conviction should be affirmed.

FIELD, J. I have arrived at the same conclusion as my Brother Grove, though not without great doubt and some fluctuation of opinion. In my judgment, the conviction must be affirmed. The object of the section was to protect persons lawfully using a highway; and one way in which a person passing along a road may be injured is by another person furiously riding upon horse-back.

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The legislature does not forbid furious riding in express terms; but it has intended to enact that if a person does commit this wrongful act he shall be guilty of an illegal act and thereupon shall be liable to a penalty. Three classes of persons are mentioned, whom it was intended to punish for breaches of the statute: drivers of waggons and other carriages, drivers of horses or mules without vehicles, and riders properly so called. The contention for the appellant creates the absurdity of making only the drivers of vehicles punishable before justices, who, however, are to have in every case power to entertain the charge. No doubt it is a maxim to be followed in the interpretation of statutes, that the ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intention of the legislature. I follow that view of my Brother Grove, by which he construes the statute as enacting that if the offender be the owner of a waggon, cart, or other carriage he is to forfeit a sum not exceeding 10*l.*, and that if any other person commits a breach of the statute he is to forfeit a sum not exceeding 5*l.* I express no opinion as to what is the proper construction of the latter part of the section, which treats of the arrest of a "driver" and of the proceedings when he refuses to disclose his name; that may require a different consideration.

Judgment for the respondent.

Solicitors for the appellant: *Finney & Bruff, for Louis & Osbert Edwards, Ruthin.*

Applied. DOLLFUS MIEG, ETC. *v.* BANK OF ENGLAND. [1949] 1 All E.R. 946.

Referred to. DOLLFUS MIEG CASE. [1949] 1 Ch. 369

Considered. DOLLFUS MIEG *v.* BANK OF ENGLAND [1950] 1 Ch. 333

[IN THE COURT OF APPEAL.]

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May 18.

ANCONA *v.* ROGERS.

Bill of Sale—Possession of Goods by Grantor—Demand of Possession by Grantee—Bailor of Goods in Possession within Bills of Sale Act (17 & 18 *Vict.* c. 36).

Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, and accordingly demanded them from the owner of a house in which the grantor had placed them, and threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation:—

Held, reversing the judgment of the Court of Exchequer, that the fact that the grantee was entitled to and demanded possession did not take the goods out of the grantor's possession within the meaning of 17 & 18 Vict. c. 36, and that the trustee in liquidation was entitled to the goods as against the grantee.

Held, also (though not necessary for the decision), that if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the Act, and would not have been taken out of the grantor's possession by the fact that the grantee was entitled to and demanded possession.

THE plaintiff brought an action on the 20th of November, 1874, against a Mr. Horlock to recover certain household furniture, plate, linen, goods, and chattels, which had been assigned to the plaintiff by a Mrs. Hewitt under an unregistered bill of sale, and which Mr. Horlock had refused to deliver to the plaintiff. The present defendant Rogers having claimed the goods as trustee in liquidation of Mrs. Hewitt, under a judge's order an interpleader issue was drawn up, in which the plaintiff affirmed, and the defendant Rogers denied, that the goods which were on the 20th of November, 1874, in the custody of Mr. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, were on that day the property of the plaintiff as against the defendant Rogers.

At the trial in Middlesex, in January, 1875, in answer to questions put by Bramwell, B., the jury found that Mrs. Hewitt was in possession of the goods at Ogbeare Hall, and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter it for him, the Court to have power to draw infer-

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ences of fact. The material facts are stated in the judgment of the Court of Appeal.

A rule nisi was afterwards obtained to enter the verdict for the plaintiff on the ground that there was no evidence that the goods were in the possession of Mrs. Hewitt at the date of the adjudication of the insolvency (1), and that the learned judge ought so to have directed the jury, and that the act of Horlock refusing the plaintiff possession of the goods could not operate so as to create or continue possession in Mrs. Hewitt.

On the 10th of June, 1875, cause was shewn by *McIntyre, Q.C.*, and *W. Paterson*, the rule being supported by *Philbrick, Q.C.*, and *Sutton*, and after consideration the Court of Exchequer, on the 7th of July, made the rule absolute to enter the verdict for the plaintiff. (2)

(1) The rule was drawn up in these terms, which were evidently a mistake for "at the date of the filing of the petition for liquidation."

(2) The judgment of the Court of Exchequer (Kelly, C.B., and Bramwell and Cleasby, BB.) was read by

CLEASBY, B. In this case, dealing with the facts proved and beyond dispute, I should consider that at the time of the petition the goods were not in the possession or apparent possession of Mrs. Hewitt within the meaning of those words in the Bills of Sale Act. They were certainly not in her apparent possession, and it appears to me that at that time the articles locked up in the rooms and the pianoforte which was in the hall were in the actual possession of Horlock, the owner and occupier of the house. She had been making some arrangements for taking the place, and in the expectation of doing so had sent down a quantity of live stock, of which the grantee under the bill of sale took possession, and also the household furniture, piano, &c., which form the subject of the present issue. She had written to Horlock to prepare to take them in, and they were accordingly taken and delivered to him there, the principal portion in the billiard room and the pianoforte in the hall. The keys of the rooms where they were placed were taken away by the person who left the goods. A notice was afterwards, and before the petition, served on Horlock, and the goods were demanded of him, and he was told that if he did not allow them to be taken they would be taken by force. He replied that they should not have them; that they were placed in his possession, and he would like to be there when they offered to take them. I do not think there is any difference between the piano and the articles locked in the rooms. It would obviously be improper to leave a quantity of articles of furniture, great and small, in a stranger's house exposed to everybody, especially without any list or inventory, and I consider the key and the locking the door to have reference to safe custody, and not to affect the question of possession; and Horlock himself treated all the articles as being in his possession, and refused to deliver them, which gave rise to the action and interpleader. The goods being in the actual posses-

From this judgment the defendant appealed.

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Feb. 21, 22, 1876. *McIntyre, Q.C.*, and *William Paterson*, for the defendant. First, the bailment to Bishop the warehouseman had ceased, and the goods while at Mr. Horlock's house, Ogbeare Hall, were in the "actual possession" of Mrs. Hewitt, the grantor of the bill of sale. They were also in her "apparent possession" within s. 7 of the Bills of Sale Act, 17 & 18 Vict. c. 36, for they were in "premises occupied by" her, she having agreed to rent the rooms from Mr. Horlock. These are questions of fact which the Court is to infer from the evidence. The possession of Mrs. Hewitt could not be determined by the demand of possession on the part of Ancona, the grantee of the bill of sale. If a creditor does not actually get possession, diligence in attempting to get it will not help him: per Mellish, L.J., in *Ex parte Jay*. (1) Secondly, assuming that Mr. Horlock was bailee of the goods, Mrs. Hewitt as bailor still remained in possession of them within the meaning of the Bills of Sale Act, and could have maintained trespass against a wrongdoer. "No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the

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sion of Horlock, were no doubt in his possession without any title or property in himself, and his possession would be that of Mrs. Hewitt until the person having title to the goods demanded them; but as soon as that was done—and undoubtedly the plaintiff had the whole property in the goods—it would, I think, be incorrect to consider the goods as being in the constructive possession of Mrs. Hewitt within the Bills of Sale Act. The mere possession is not sufficient, because if they had been taken possession of by the claimant, and afterwards retaken possession of on behalf of Mrs. Hewitt, it is clear, I apprehend, that they would not have been in her possession within the Act, because they were wrongfully in her possession; and so here, as soon as the goods were demanded of Horlock and withheld, any constructive possession which she had became wrongful, or rather, perhaps, was ended, and was not available in favour of the trustee against the real owner.

Although the opinion of the jury was taken on the question of possession, yet leave was reserved for the Court to deal in the fullest manner with the evidence, and to draw inferences. The real facts were indeed undisputed, and the only question is the proper legal conclusion to be drawn from them. For the above reasons we think the title of the grantee in the bill of sale ought to prevail, and that the rule ought to be made absolute to enter a verdict for the plaintiff against the defendant Rogers.

(1) Law Rep. 9 Ch. 697, 705.

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latter by virtue of his possession, the former by reason of his property. This is laid down in 2 Roll. Abr. p. 551, pl. 22, 30; Com. Dig., Trespass (B. 4); and in other authorities": per Parke, B., in *Manders* v. *Williams*. (1) In Com. Dig., Trespass (B. 4), after saying that to entitle a man to bring trespass for goods he must have either the actual possession or a constructive possession in respect of the right being actually vested in him, it is said: "If trespass be done to goods in the hands of a bailee, trespass lies by the bailee: 2 Rol. 551, l. 31. And also by the bailor, and he who first recovers shall have the damages: 2 Rol. 569, l. 22." And see *Lotan* v. *Cross*. (2)

Philbrick, Q.C., and *R. E. Webster*, for the plaintiff. The evidence shews that Mrs. Hewitt was not in occupation of the rooms, or in actual or apparent possession of the goods. They were in the possession of Mr. Horlock as bailee, and there is nothing in the Bills of Sale Act to prevent the plaintiff from enjoying the right of property and right of possession given him by the bill of sale. The plaintiff did all he could to obtain actual possession, and is within the principle of *Gough* v. *Everard* (3) and *Robinson* v. *Briggs*. (4) Mrs. Hewitt, the bailor, had no title to the goods, having assigned them to the plaintiff, and a bailee can have no better title than his bailor: *Batut* v. *Hartley*. (5) "Possession or apparent possession" in s. 1 of the Bills of Sale Act must mean "actual or apparent possession," and it cannot be said that one who bails goods to a warehouseman is in "apparent possession," and he certainly is not in actual possession. The authorities cited with regard to trespass are irrelevant, because they assume that the property of the goods was in the bailor, whereas Mrs. Hewitt had transferred the property to the plaintiff.

McIntyre, Q.C., in reply. In *Gough* v. *Everard* (3) and *Robinson* v. *Briggs* (4) the grantees of the bills of sale took actual possession.

Cur. adv. vult.

May 18, 1876. The judgment of the Court (Cockburn, C.J.,

(1) 4 Ex. at p. 345; 18 L. J. (Ex.) 457.
(2) 2 Camp. 464.
(3) 2 H. & C. 1; 32 L. J. (Ex.) 210.
(4) Law Rep. 6 Ex. 1.
(5) Law Rep. 7 Q. B. 594.

Mellish, L.J., Baggallay, J.A., Mellor and Grove, JJ.) was read by

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MELLISH, L.J. This was an appeal from a judgment of the Court of Exchequer on an interpleader issue directed to try the question whether certain furniture and other goods were the property of the plaintiff Ancona as against Rogers, the trustee of the estate of Mrs. Hewitt, a liquidating debtor. The plaintiff claimed under a bill of sale executed by the debtor. The defendant disputed the validity of the bill of sale under the Bills of Sale Act, upon the ground that on the day when the debtor presented her petition the goods were still in her possession.

Mrs. Hewitt borrowed various sums from the plaintiff between April and July, 1874, and on the 10th of September, 1874, she executed a bill of sale of the furniture and goods in question as a security for the repayment of the money with interest. By the terms of the bill of sale Mrs. Hewitt was allowed to retain possession of the goods until payment of the money was demanded, but if she did not repay the money with interest within twenty-four hours after demand, the plaintiff was entitled to take possession of the goods. The bill of sale was never registered. Mrs. Hewitt having given up her house in Sussex, and intending to go and reside at the house of Mr. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, in a portion of his house to be afterwards arranged between them, delivered possession of the goods to one Bishop to keep for her for some time, and then to convey them to Ogbeare Hall. On the 12th of October the goods were brought by Bishop to Ogbeare Hall. Mr. Horlock was not at home, but Mrs. Horlock allowed the goods to be placed in four rooms, and Bishop, without any objection on the part of anybody, locked the doors of the four rooms, and took away the key with him. On the 23rd of October the plaintiff served Mrs. Hewitt with a written demand for the payment of the money owing to him. The money not having been paid, the plaintiff, on the 27th of October, went to Ogbeare Hall, and demanded possession of the goods, both from Mr. Horlock's bailiff, and Mr. Horlock himself. He gave notice to Mr. Horlock of his title to the goods, and threatened to take them by force. Mr. Horlock, however, refused to allow him

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to enter the house, or to take possession of the goods. On the 4th of November Mrs. Hewitt presented her petition for liquidation.

Under these circumstances it has been held by the Court of Exchequer that Mrs. Hewitt was not in possession of the goods, at the time she presented her petition, within the Bills of Sale Act, and the Court on that ground ordered the verdict found for the defendant at the trial to be set aside, and a verdict to be entered for the plaintiff. From this decision the defendant has appealed.

It seems necessary to consider, first, who was in possession of the goods after they were locked up in the rooms at Ogbeare Hall; and secondly, what was the effect of the plaintiff having become entitled to the possession of the goods by demanding the money, and of his attempt to obtain actual possession of them. Now there can be no doubt that the goods were delivered by Mrs. Hewitt to Bishop, and that Bishop took possession of them as her bailee, but we are of opinion that the bailment to Bishop terminated when the goods were placed in the rooms at Ogbeare Hall. It is true that Bishop locked them up, and took away the key, but he held that key as agent to Mrs. Hewitt, who was herself at Launceston; nor does it appear—and there is nothing to prove—that Bishop was intended to exercise any further dominion over them.

We will next consider whether the goods came into the possession of Mr. Horlock, and this depends upon the question, whether what took place at Ogbeare Hall amounted to a delivery of the possession of the goods by Mrs. Hewitt to Mr. Horlock, as bailee to hold for her, or to a delivery of the possession of the rooms by Mr. Horlock to Mrs. Hewitt. This is a question of considerable nicety, but we are of opinion that what took place had the effect of a delivery of the possession of the rooms to Mrs. Hewitt for the purpose of keeping her goods in them. The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives the means of entrance. The possession of premises cannot be changed solely by the delivery of a key, but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession

of the premises to which the key gives the means of entrance should be changed. It is true, that in this case the key was not delivered to Bishop, but taken by him. But the rooms were appropriated by Mrs. Horlock to the reception and custody of the goods, and no objection was made, then or afterwards, to the key being taken by Bishop, who was acting in the matter as the agent of Mrs. Hewitt. On the contrary, Mr. Horlock, on returning home, assented entirely to what had been done in his absence. Mr. Horlock was under no obligation to give Mrs. Hewitt possession of those rooms, and if he had dissented from what was done in his absence, and had opened the doors of the rooms, either forcibly or by another key, we think he would have re-obtained possession of his own rooms, and at the same time have obtained possession of Mrs. Hewitt's goods as bailee. There is, however, no evidence that he ever did open the doors prior to the 4th of November, and it is quite possible that he may have preferred to allow Mrs. Hewitt to have the use of his rooms to keep the goods in, rather than to take upon himself the responsibility of being the bailee of them.

We are of opinion, therefore, that Mrs. Hewitt was the only person who was in possession of the goods whilst they remained locked up in the rooms at Ogbeare Hall. If this conclusion is correct, the only other point which it is necessary to determine is, whether the fact of the plaintiff having become entitled to the possession of the goods, and having, although unsuccessfully, endeavoured to obtain possession of them, takes the case out of the provisions of the Bills of Sale Act.

Now, if the case depended upon the Bankrupt Act, there is no doubt that the endeavours of the plaintiff to obtain possession would afford abundant evidence that the goods did not remain in the possession of Mrs. Hewitt with his consent, but, as was observed in the case of *Ex parte Jay* (1), there is a material distinction between the provisions of the Bills of Sale Act and those of the Bankrupt Act. In the Bills of Sale Act the words "with the consent of the true owner" have been purposely omitted, and the Act is applicable if at the time the grantor of the bill of sale becomes bankrupt the goods are in his possession, or apparent

(1) Law Rep. 9 Ch. 697.

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possession, whether with the consent of the true owner or not. We think it was intended that if a man chooses to lend money upon a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy.

Although these observations are sufficient to dispose of the case, it may be desirable shortly to consider what would be the result if we are wrong in supposing that the goods were not delivered to Mr. Horlock as bailee. Now, if the goods were delivered to Mr. Horlock as bailee, there would be two questions to be considered: first, are goods in the possession of a bailee to hold on account of the bailor still in the possession of the bailor within the meaning of the Bills of Sale Act? And, secondly, if they are, were the goods taken out of the possession of Mrs. Hewitt by the plaintiff having required Mr. Horlock to allow him to take possession of them, and by Mr. Horlock having wrongfully refused to deliver possession of them?

Now, with reference to the first question, there is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrong-doer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sale Act, the word "possession" was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act. As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him and is exercising dominion over them, the case seems within the mischief against which the Act is directed.

Lastly, we have to consider whether the demand made by the plaintiff requiring Mr. Horlock to deliver up the goods, and the

refusal by Mr. Horlock to deliver up the possession of the goods, assuming Mr. Horlock to be the bailee of the goods, had the effect of taking the possession of the goods out of Mrs. Hewitt. It was admitted in the argument before us, as it was impossible to help admitting, that this demand and refusal had not the effect of putting the plaintiff into possession of the goods. It was argued, however, that though the plaintiff never obtained possession of the goods, yet that the demand and refusal had the effect of taking the goods out of the possession of Mrs. Hewitt. We cannot understand how, if the plaintiff never obtained possession of the goods, the possession of the goods could be changed at all by the demand and refusal to deliver them up. Mr. Horlock had no title to the goods of his own of any kind, and if he held the goods on Mrs. Hewitt's account before he refused to deliver them up, it seems to us he still held them on her account after he refused to deliver them up. There is no evidence that he either attorned to the title of the plaintiff or set up any title of his own as against that of Mrs. Hewitt prior to the 4th of November. We think, therefore, that if the goods were ever delivered to Mr. Horlock as the bailee of Mrs. Hewitt, he still continued to hold them as her bailee on the 4th of November.

On the whole, we are of opinion, that the judgment of the Court of Exchequer ought to be reversed, and the rule to enter a verdict for the plaintiff, discharged.

Judgment reversed.

Solicitors for plaintiff: *Pattison, Wigg, & Co.*
Solicitors for defendant: *Duignan & Smiles.*

1876
April 27.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

ROBINSON, APPELLANT; CLIFF, RESPONDENT.

Bread, Sale of—Baker not provided with Scales and Weights—Delivery of Bread from a Cart at a Customer's House pursuant to General Order—6 & 7 Wm. 4, c. 37, s. 7.

By 6 & 7 Wm. 4, c. 37, s. 7, "every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights . . . and in case any such baker or seller of bread . . . shall, at any time, carry out or deliver any bread without being provided with such beam and scales with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay" a sum of money.

The appellant, a baker, delivered bread from a cart at a customer's shop pursuant to a general order given some time previously: he was then unprovided with scales and weights:—

Held, that he had committed an offence against the foregoing enactment.

CASE stated by justices of the peace for the town of Nottingham under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, charging that "on the 16th day of July, 1875, John Robinson, 16, Pelican Street, Radford, Notts, in the town of Nottingham, being then a baker, and then and there conveying and carrying and delivering bread for sale in a certain cart drawn by one horse, unlawfully did not carry or provide, and was not then provided with, in such cart, a beam and scales with proper weights, in order that the bread sold might be weighed by the purchaser thereof."

It was proved, upon the hearing of the information, that the appellant, being a baker and seller of bread, living at Pelican Street, Radford, Notts, did, on the 16th of July, take and deliver bread from a cart (not at the time being provided with proper weights and scales as required by 6 & 7 Wm. 4, c. 37, s. 7) outside the shop to a customer in Russell Street, Nottingham. When the appellant came out of the shop after delivering the bread, the respondent said to the appellant: "I shall want to weigh your bread: have you got your scales and weights with you? I want to weigh the bread." The appellant said, "I haven't scales to

weigh it with." The respondent said, "I shall weigh it in my own scales, and I shall want you to see it weighed." The bread in the shop was weighed in the presence of the appellant: there were eleven loaves deficient in weight. The appellant was a wholesale baker, selling also at his shop by retail.

The appellant called Mary Morris, the wife of Henry Morris, a provision dealer and breadseller (the customer above referred to), living in Russell Street aforesaid, and she stated that on the 16th of July the appellant came to her shop and asked her, "How much bread?" She said, "Two stones." The appellant left the shop, and immediately after returned, bringing the bread into the shop from a cart standing in the street. Such bread was weighed by the respondent, and it was deficient in weight. She also stated that the appellant allowed her half a quarter to every ten stones for any deficiency of weight. She further stated that she took about ten stones of bread weekly from the appellant, with whom she had dealt two years. The appellant came to her at the commencement of her trading with him, and asked for her orders, and if he could supply her. She had a pass-book. The appellant entered the bread in his book. When the appellant came to the shop he said, "How much?" She never sent to the appellant's shop to order the bread; he always came to her.

On the part of the appellant it was contended that he went round to supply bread to Mary Morris, having a general order given two years previously, and that it was not necessary that he should be provided with weights and scales when he went to deliver the bread for which he had a general order.

The justices convicted the appellant in the mitigated penalty of 1*l.* including costs; but they found as a fact that the delivery of the bread by the appellant to Mrs. Morris was in compliance with a general order and in the usual course of trading; but the quantity of bread to be delivered at each time the appellant called was ascertained between the parties only at the time of his calling.

If the Court should be of opinion that the conviction was legally and properly made, the conviction was to stand; but if the Court should think otherwise, it was to be quashed.

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Horace Smith, for the appellant. The conviction cannot be supported. The 7th section of 6 & 7 Wm. 4, c. 37 (1) was intended to apply only to hawkers of bread—that is, those who convey it about in order to sell it to promiscuous customers. The enactment does not reach the appellant, who simply delivered bread pursuant to an order given some time previously; there

(1) 6 & 7 Wm. 4, c. 37, is intituled "An Act to repeal the several Acts now in force relating to bread to be sold out of the City of London and the liberties thereof, and beyond the weekly bills of mortality and ten miles of the Royal Exchange; and to provide other regulations for the making and sale of bread, and for preventing the adulteration of meal, flour, and bread, beyond the limits aforesaid," and enacts as follows:—

Sect. 6. "Every baker or seller of bread beyond the limits aforesaid shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and scales with proper weights, or other sufficient balance, in order that all bread there sold may, from time to time, be weighed in the presence of the purchaser or purchasers thereof . . . and in case any such baker or seller of bread shall neglect to fix such beam and scales, or other sufficient balance, in manner aforesaid, or to provide and keep for use proper beam and scales and proper weights or balance, or shall have or use any incorrect or false beam or scales or balance, or any false weight not being of the weight it purports to be, according to the standard in the Exchequer, then, and in every such such case, he, she, or they shall for every such false beam and scales and balance, or false weight, forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct."

Sect. 7. "Every baker or seller of bread, beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with, and shall constantly carry in such cart or other carriage, a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may, from time to time, be weighed in the presence of the purchaser or purchasers thereof . . . and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights, or other sufficient balance, or whose weights shall be deficient in their due weight according to the standard in the Exchequer, or shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then, and in every such case, every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct."

was no "sale" within the meaning of the statute at the house of the customer, when the bread was delivered; for "sale" includes the order as well as the delivery. The construction of the 7th section is very plain on examining the language of its earlier portion; and the somewhat vague expressions of the latter portion must be confined in their operation to the cases provided for in the preceding clause. The appellant has a shop, and will be no doubt liable for a penalty if he infringes the terms of the 6th section which relates to bakers keeping shops: but that enactment does not meet the facts before the Court.

Douglas Kingsford, for the respondent, was not called upon to argue.

BRAMWELL, B. I am of opinion that the conviction was right, and ought to be affirmed. The statute is somewhat peculiar in its provisions and contains minute regulations. I incline to think that the counsel for the appellant was so far correct in contending that the earlier part of s. 7 is applicable to hawkers of bread only, and that s. 6 relates to bakers who keep shops; but then it seems to me clear that the penal clause in s. 7, applies to the sale and delivery of bread by both classes of bakers. I doubt whether the appellant took out the bread in his cart "for sale;" but, at any rate, he took it out for the purpose of delivery; and the words in the penal portion of the 7th section are "shall at any time carry out or deliver any bread," which must mean delivery after a previous sale, and therefore the appellant is liable to be convicted for an unlawful delivery, even although the words "for sale" be read in after the words "carry out."

Some portion of the penal clause seems to me inapplicable to a sale by a man carrying about bread in a cart: the words "shall at any time refuse to weigh any bread . . . . delivered by his, her, or their journeyman, servant, or other person," appear to refer to a sale by a baker keeping a shop who sends out the bread by his servant to his customers, and therefore, in my opinion, the penal clause must be taken to include bakers having shops. It seems to follow that no baker can safely deliver even one loaf without being provided with weights and scales at the time of delivery, although that loaf may have been weighed at the time of sale. This con-

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clusion may seem to produce unreasonable consequences; but these stringent provisions may be necessary to protect the purchaser. It appears clear to me that if one part of the penal clause in the 7th section applies to sales by bakers keeping shops, the whole of it must likewise apply to them. In my judgment, as the appellant has delivered bread without at the time being provided with a beam and scales and proper weights, the case falls within the words of the statute, and, I believe, within its spirit.

MELLOR, J. I also think that the magistrates were right. The statute seems to me to have contemplated three occasions, upon which a customer ought to have an opportunity of weighing the bread which he buys: first, it may be sold at a shop; secondly, it may be sent out and sold to promiscuous customers; thirdly, it may be delivered at the house of a customer who has given a previous order. It is proper that a customer on each of these occasions should have the opportunity of protecting himself by causing the bread to be weighed; and if the baker were not obliged to provide himself with scales, the customer might have no means of ascertaining whether the proper weight is delivered to him. It may seem at first sight unreasonable that the seller is to be bound to take with him scales and weights, although he proposes to deliver only a single loaf; but the primary intention of the statute is to protect the buyer, and it must be construed with reference to this object.

DENMAN, J. I also think that the conviction was right, but my judgment is based upon different grounds from those assigned by my learned Brothers. The earlier portion of the 7th section applies only to persons who "convey or carry out bread for sale in and from any cart or other carriage;" the 6th section was intended to provide that a baker having a shop shall keep there scales; and in my opinion the words "for sale in and from any cart or other carriage" in the 7th section were inserted in order to prevent it from extending to cases where the bread is merely in transit from one place to another, or is being taken out for charitable purposes, as, for instance, to be given to the poor, or where it is carried about for delivery in baskets without a cart.

The real point reserved for our consideration seems to me, whether there was a sale of the bread by the appellant when he delivered it to his customer; and I think there was; the bread was sent pursuant to a general order given some time before, and the property in it did not pass until the time of delivery, when it was accepted by the customer. I think that upon the true interpretation of the statute it applies to the present case where the bread was carried out in a cart for the purpose of being sold, but that it does not extend to those instances where bread is carried about by a baker's servants in baskets.

Judgment for the respondent.

Solicitors for appellant: *Rogerson & Ford, for Everall & Turner, Nottingham.*

Solicitors for respondent: *Hughes, Hooker, Buttanshaw, & Murton, for S. G. Johnson, Nottingham.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

May 26.

SNEARY *v.* ABDY.

Sheriff—Writ of Fi. Fa.—Possession-money and Fees—Judgment Debt—Levy without Instructions from Execution Creditor.

2 C&D 30

When goods have been seized under a writ of fi. fa., and the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realize thereby the amount of his possession-money, fees, and expenses. (So *held* by Grove and Field, JJ., Cleasby, B., dissenting.)

Goods having been seized under a writ of fi. fa., the execution debtor under the Bankruptcy Act, 1869, s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realize the amount of his possession-money, fees, and expenses. The execution debtor having sued in a county court the sheriff for an unlawful sale, the judge directed the jury, that in the absence of evidence to shew that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor:—

Held (by Grove and Field, JJ., Cleasby, B., dissenting), that the direction by the judge of the county court was correct.

THIS was an appeal by a case stated from a judgment of the county court of Essex in an action against the sheriff of Essex.

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The facts and arguments in this case are sufficiently stated in the judgments hereinafter set forth.

Feb. 12; May 5, 25, 26. *John Rose*, for the plaintiff.

Philbrick, Q.C. (*W. Masterman* with him), for the defendant.

The following authorities were cited in the course of the argument in addition to those mentioned in the judgments:—

As to the right of a judgment creditor to enforce an execution against the goods of his insolvent debtor, *Edwards* v. *Scarsbrook* (1); *Slater* v. *Pinder* (2); *Ex parte Williams, In re Davies* (3); *Ex parte Sheriff of Middlesex, In re England* (4): as to the difference between liquidation by arrangement and composition under the Bankruptcy Act, 1869, *Ex parte Birmingham Gaslight and Coke Co., In re Adams* (5): as to the right of the successful party to levy for poundage, fees, and expenses of execution, the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), Order XLII., Rule 13: as to the right of a plaintiff under 43 Geo. 3, c. 46, s. 5, to levy for the costs of a previous execution, *Bayley* v. *Potts* (6): as to the property of an execution debtor in the goods seized, *Playfair* v. *Musgrove* (7): that a sheriff is merely an agent to the party issuing execution, *Barker* v. *St. Quintin* (8): as to a sheriff being entitled to no remuneration at common law, Westminster 1, c. 26; *Woodgate* v. *Knatchbull* (9); *Phillips* v. *Viscount Canterbury* (10); *Marshall* v. *Hicks* (11): as to a sheriff's liability to an execution creditor, *Wilbraham* v. *Snow* (12); *Ruston* v. *Hatfield* (13): as to a sheriff's right to poundage, where after seizure and before sale the parties have compromised, Watson on Sheriff, 2nd ed. p. 114, or where the judgment is set aside for irregularity, *Bullen* v. *Ansley* (14); *Rawstorne* v. *Wilkinson* (15);

(1) 3 B. & S. 280; 32 L. J. (Q.B.) 45.

(2) Law Rep. 6 Ex. 228; in Ex. Ch. 7 Ex. 95.

(3) Law Rep. 7 Ch. 314.

(4) Law Rep. 12 Eq. 207.

(5) Law Rep. 11 Eq. 204.

(6) 8 A. & E. 272.

(7) 14 M. & W. 239, per Alderson, B., p. 246.

(8) 1 D. & L. 542, per Lord Abinger, C.B., at p. 551.

(9) 2 T. R. 148, per Grose, J., at p. 158.

(10) 11 M.&W.619; 12 L. J.(Ex.) 401.

(11) 10 Q. B. 15; 16 L. J.(Q.B.) 134.

(12) 2 Wms. Notes to Saund. 136.

(13) 3 B. & Ald. 204.

(14) 6 Esp. 111.

(15) 4 M. & S. 256.

Miles v. *Harris* (1): as to a sheriff's right to poundage upon a capias utlagatum, *Graham* v. *Grill* (2): as to a sheriff's right to poundage in addition to his fees, *Davies* v. *Griffiths* (3): as to a sheriff's right to sue a judgment debtor for his fees in executing a capias ad satisfaciendum, *Hill* v. *Buchanan* (4): as to the liability of a solicitor to remunerate a sheriff or his officer for executing process, *Maybery* v. *Mansfield* (5); *Newton* v. *Chambers*. (6)

CLEASBY, B. In this case the question is whether the sheriff is liable in an action of trover or trespass for selling a horse which he professed to sell under a fi. fa. The fi. fa. was delivered to the sheriff, endorsed to levy 303*l*. 8*s*. with interest, besides officer's fees, poundage, and other incidental expenses, and on the 12th of March, 1875, the sheriff seized under it.

On the 19th of March, before any sale, the execution debtor filed his petition for liquidation, and notice was given to the sheriff, who remained in possession taking no steps to sell, and not being called upon to do so or to return the writ. At the first meeting of creditors a proposition was made, which was agreed to by the execution creditor and the other creditors for a composition, and this was afterwards confirmed and duly registered on the 20th of April, with notice to the sheriff. The sheriff remained in possession for some time afterwards, though requested to withdraw by the execution debtor. He refused to withdraw without payment of fees and possession-money. The execution creditor never authorized him to withdraw, and stated that he supposed the solicitor for the debtor would take the necessary steps, and as he had accepted the composition he had nothing further to do in the matter. No question arises in this case as to the length of time during which the sheriff was in possession, or his right to retain his possession-money during the whole of that time. The question is the same as if a week after the composition had been agreed to and paid, the sheriff, being in possession, is called upon by the debtor to withdraw, and the execution creditor gives him

(1) 12 C. B. (N.S.) 550; 31 L. J. (C.P.) 361.
(2) 2 M. & S. 294.
(3) 7 Dowl. 204.
(4) Ir. T. R. (Ri. La. & Sch.) 553, per Curiam, at p. 556.
(5) 9 Q. B. 754; 16 L. J. (Q.B.) 102.
(6) 13 L. J. (Q.B.) 141.

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no direction to withdraw or to sell, but leaves him to act according to his duty. The county court judge upon these facts refused to nonsuit, but offered a case, and in leaving the case to the jury told them that if the execution creditor had directed the sheriff to sell he would have been justified in doing so, but there was no evidence of that.

It appears to me that upon these facts, the writ remaining in the hands of the sheriff unexecuted (there being no rule to return the writ until after he had sold and after the commencement of the present action), it cannot be said that the sheriff was not justified in obeying the direction of the writ, although he had notice of the plaintiff being satisfied so far as his claim to the debt was concerned. It has been considered in some cases that if a compromise between the plaintiff and defendant in the action is made after the writ has been executed by seizure, the sheriff cannot be deprived of his right to poundage, *Alchin* v. *Wells* (1), *Chapman* v. *Bowlby* (2): but a different question arises in the present case. No question is raised in the present case about poundage, and many authorities cited as to the claim for poundage have no bearing on the present case. The real question is whether, having no instructions from the creditor to withdraw, the sheriff was not justified in executing the writ in his hand. It is clear the creditor's claim for the fees and expenses was not satisfied as well as for the debt by the composition. The seizure under the writ was a security, which the creditor had for his debt and for the sheriff's fees and expenses.

This was expressly decided by the Lords Justices in the case of *Ex parte Jones* (3), and the distinction between liquidation, which was the case in *Ex parte Rayner* (4), and composition is there pointed out, and Lord Justice James says: "In order to take away a legal right from anybody it is necessary to shew express words in the Act, or clear implication. In this case the respondents" (execution creditors) "have, by due process of law, obtained a security on all the goods which the sheriff could seize. That was their legal right, and they have it still unless it can be shewn to

(1) 5 T. R. 470.

(2) 8 M. & W. 251 (per Lord Abinger).

(3) Law Rep. 10 Ch. 663.

(4) Law Rep. 7 Ch. 325.

have been taken away from them. If the petition had resulted in a bankruptcy or a liquidation, no doubt their right would have been lost, because the goods would have been not the goods of the debtor but the goods of the trustee. But in a composition the goods of the debtor do not cease to be his goods, that is of the very essence of a composition." It could not be disputed, and was not disputed at the bar, that after levy by seizure the sheriff could not withdraw upon tender of the judgment debt only, but was bound to insist upon payment of the fees and expenses also. Now, the composition only satisfied the debt. If the creditor had directed the sheriff to withdraw, he would have given up his security and taken upon him probably the payment of those matters to the sheriff: but the sheriff is left, as it appears to me, in the position of having a writ which he must obey, or lose all right to his fee and possession-money, and I think he was justified in obeying it. In my view it is not necessary to advert to any right of the sheriff independently of the will of the execution creditor, for which the case of *Curtis* v. *Mayne* (1) was referred to. A different question would have arisen if the execution creditor had directed the sheriff to withdraw. It appears to me that the county court judge was right in holding that the sheriff would have been justified in selling if he had had the creditor's instruction to do so, but wrong in holding that any further instructions were necessary than those originally given to execute the writ for the purpose endorsed, and which had never been withdrawn. There is an additional reason not yet adverted to, viz. that before the sale, but after the registration of the composition, and, as I understand, after payment of the composition, viz. on the 28th of May, the Court of Bankruptcy had issued an injunction against the sheriff taking any further proceedings under the fi. fa. until the further order of the Court. It is certainly singular that the sheriff should venture to encounter the consequence of selling in the face of this order; but I cannot see how this order could affect the question before the judge of the legality of the sale; and the opinion of the judge that if the creditor had directed the sale, and so disobeyed the order, it would have been legal, shews that the

(1) 2 Dowl. (N.S. 37.)

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effect of the restraining order was not raised before him, and is not reserved for us.

GROVE, J. This is a case in which much doubt may be entertained; but after considering the matters argued before us, I find myself unable to agree with my brother Cleasby. The execution creditor, having accepted a composition, was not entitled to have the amount of the fi. fa. levied upon the present plaintiff's goods; the sheriff had notice that the execution creditor was satisfied; but without any instructions from him a horse of the plaintiff was sold in order to defray the amount of the sheriff's fees and possession money. Upon reflection I am at a loss to see any right in the sheriff to enforce payment of these expenses against the execution debtor. He could claim no lien upon the horse, because it was not the property of the person by whom he was set in motion, but of the execution debtor, to whom it continued to belong after the composition had been accepted. No relation by way of contract existed between the sheriff and the execution debtor, and therefore no lien based upon an agreement either express or implied could arise. By the common law the sheriff was not entitled to remuneration of any kind for executing the king's writ; his right to reward for his trouble depends simply upon certain statutes. Poundage was given by 28 Eliz. c. 4, and in *Bilke* v. *Havelock* (1), tried in the year 1813, Lord Ellenborough said, in reference to the rights of a sheriff under a writ of fieri facias: "If the goods are sold, he receives in poundage the specific recompense for his trouble which the law has provided. He is entitled to none for seizing and remaining in possession of goods belonging to a stranger." This was spoken of the law as it stood in the latter part of the reign of George the Third; and in spite of some alteration by subsequent legislation the sheriff continues to be without any individual right against the execution debtor; he has no claim to payment of his expenses apart from the power of the creditor to enforce payment of the judgment. The statute 43 Geo. 3, c. 46, s. 5, gave a plaintiff the right to levy for the poundage fees and expenses, and by the Common Law Procedure

(1) 3 Camp. 374.

Act, 1852, s. 123, this privilege was extended to every case where a party to a suit is entitled to execution. Under these statutes the sheriff has not even a qualified right in himself for his poundage fees or expenses as against the execution debtor; it is the plaintiff or the successful party who is to levy them. In the present case, if the levy for the possession-money and fees had been at the instance of the execution creditor, we might have been driven to a different conclusion. The statute 1 Vict. c. 55, and the table of fees made in pursuance of its provisions, merely fix the amount of fees and possession-money payable by the party entitled to the execution, and without his directions the sheriff has no power to detain, much less to sell, the goods of the execution debtor; the right to seize only exists as ancillary to and in aid of the recovery of the judgment debt. So far as appears from the authorities cited before us, the present is the first occasion upon which a claim of this kind has been set up on behalf of the sheriff; this shews that those who are conversant with a sheriff's duties have hitherto thought it not to be sustainable: it is not a conclusive argument, but it is a matter not to be wholly laid out of consideration in arriving at a decision upon the present facts.

FIELD, J. This is an action tried with a jury at the Romford County Court; and the question now to be decided is brought before us by a case stated by the learned county court judge. The action was brought by the plaintiff to recover the value, or damages for the seizure, of a horse seized and sold by the defendant as sheriff of Essex. The facts were that, on the 12th of March, 1875, the defendant as such sheriff seized the horse in question under a writ of fi. fa. to levy 303*l.* 8*s.* and interest, besides sheriff poundage, officer's fees, cost of levying, and all other legal incidental expenses. On the 19th of March the execution debtor (the present plaintiff) filed his petition for liquidation under the 125th section of the Bankruptcy Act of 1869, and notice of such petition was served upon the sheriff.

At the first meeting of his creditors, instead of proceeding by way of liquidation, it was agreed by the proper majority that a composition should be accepted by them in satisfaction of their debts under the provisions of the 126th section of the Bankruptcy Act of 1869; and the execution creditor was an assenting party to the

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9 CPD 307

resolution. He did not, however, take any steps to remove the sheriff from possession, or to countermand the execution of the writ, and the sheriff remained in possession until the sale; but for so doing, or for proceeding to sell, he had no authority from the execution creditor or his solicitor. This resolution for a composition was registered on the 20th of April, and notice was upon the same day given to the defendant; but although requested to withdraw by the execution debtor (the plaintiff), he refused to do so without payment of his possession-money and fees accrued due from the date of the seizure to the time of such request, and on the 28th of May the defendant sold the plaintiff's horse to realise 23*l.* 7*s.* 6*d.*, the amount of his fees, possession-money, &c., up to that date. On the trial, it was at the close of the plaintiff's case submitted on the behalf of the defendant that there should be a nonsuit, on the ground that the sheriff was by law entitled to proceed to a sale of the goods seized in order to obtain his fees and possession money in case of compromise between the execution creditor and debtor, and that the acceptance by the execution creditor in this case of the composition was in the nature of such a compromise. The learned judge declined to nonsuit, but left the case to the jury, with direction that in the absence of any evidence to shew that the sheriff was required to proceed to the sale by the execution creditor, he was not justified in doing so, and that such sale gave the plaintiff a cause of action. The jury found a verdict for the plaintiff for 35*l.*, and thereupon the judge stated the case now under consideration, the question reserved being whether he was wrong in refusing to nonsuit, or in his direction so given to the jury. On the argument of the case before us it was not denied that the execution creditor, having assented to the composition, and the resolution having been duly registered, had lost his right to have his debt paid by a sale of the horse. The execution creditor being thus barred, the sheriff did not proceed to any sale for the purpose of levying any poundage, and he could not have any right so to do, the right to poundage clearly depending upon there being an actual levy of the debt; nor was it contended before us that any such right existed; but it was said that he had a right to sell for his fees, possession-money, and incidental expenses. In support of the right thus claimed on the part of the sheriff, of his own motion and in his own right, and without any

expressed directions or authority on the part of the execution creditor, to proceed to sell, a passage from Watson on Sheriff, p. 110, was cited. It is there said, that the general proposition that the sheriff is not entitled to poundage and expenses until the goods have been sold, "does not apply to a case where, after the seizure of the goods, the parties enter into a compromise before the sheriff sells them. In such case the sheriff has been held to be entitled to his poundage." And a passage in 1 Archbold's Practice, 588 (9th ed.), was also cited to the effect that it was open to doubt whether a sheriff can proceed "to sell, in order to pay himself his poundage, after a compromise between the parties." The authority cited in support of the proposition, that the sheriff is entitled to his poundage in the case of a compromise, is the case of *Alchin* v. *Wells* (1); but on examining that case it will be seen (as was subsequently pointed out by Parke, B., in *Chapman* v. *Bowlby* (2)), that it may be supported on the ground that there the execution creditor did, in fact, obtain part of his money by the compulsion of the writ, which was considered to amount to a levy, and it is no authority, therefore, for the proposition now contended for, no part of the sum recovered having been levied in the present case. But it was further urged on behalf of the sheriff, that the statute 7 Wm. 4 and 1 Vict. c. 55, which by s. 2, enacts that it shall be lawful for sheriffs to demand, take, and receive such fees as those now in question, conferred the authority claimed in the present case, and a decision of Wightman, J., as being to that effect, in a case of *Curtis* v. *Mayne* (3), was cited. But the point decided in that case was, that the sheriff was entitled to deduct the fees there claimed from the amount of the levy, although the plaintiff had not indorsed any direction to that effect upon the writ. There was, however, again in that case an actual levy of part of the debt recovered, and it seems to me therefore that the present question neither arose nor was intended to be decided. No authority having thus been produced in support of the right claimed, in this absence of authority it becomes necessary to consider the question now raised upon principle. Now, it being conceded that under the circumstances of the present case the sheriff had no right to proceed to a sale for his poundage, what are the grounds upon which his alleged right to sell for his fees stands? Originally,

(1) 5 T. R. 470. (2) 8 M. & W. 252. (3) 2 Dowl. (N.S.) 37.

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the sheriff, as an officer of the Crown, was not entitled to any reward except what he took of the king. The 28th Eliz. first gave him a right to receive of the party suing out the execution, a reward in the shape of poundage; but it was not until 43 Geo. 3, c. 46, that a plaintiff suing out execution was entitled to levy the poundage of the goods seized over and above the sum recovered. This statute also included the right to levy, "fees and expenses of execution," coupling them with poundage. Upon the construction of this statute questions arose in the courts as to what particular fees and expenses might be claimed or levied in addition to the sheriff's poundage, and those questions were set at rest by the above-mentioned statute 7 Wm. 4 & 1 Vict. c. 53, which fixed in what case and to what amount the sheriff should be entitled to reward in addition to his poundage, but the statute gave no further authority as to the mode of recovering these fees than that given by the preceding statutes. Now, the express language of 43 Geo. 3, c. 46, is, that in every action in which the plaintiff is entitled to levy (that is the sum recovered) he may also levy the poundage fees and expenses over and above the sum recovered by the judgment; and this is also the language of the Common Law Procedure Act of 1852, s. 123, by which the remedy was extended to other parties than the plaintiff who might be entitled to levy under writs of execution. All that seems to me, therefore, to be enacted is this, that in those events in which a party is entitled to levy the sum recovered or awarded, he may also levy the sheriff's fees as well as the poundage; but that when the right to levy the debt is barred, the poundage and fees cease to be leviable also. Res accessoria sequitur rem principalem. In any event also it seems to me that no right to proceed to sale for these fees and expenses exists in the sheriff without any direction or authority given him by the party suing out execution in a case like the present, where the original mandate to levy the debt has been determined by the subsequent satisfaction. I think, therefore, that the learned judge was right in declining to nonsuit and in his direction, and that the verdict must stand.

Judgment for the plaintiff.

Solicitors for plaintiff: *Smith & Howard.*
Solicitors for defendant: *Paterson, Snow, & Burney.*

[IN THE COURT OF APPEAL.]

1876
July 29.

HYDE *v.* WARDEN.

Practice—Interim Preservation of Property—Receiver and Manager—Appointment by Court of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *subs.* 8—*Rules of Supreme Court, Order LII., Rules* 1, 3, 4.

In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the Court of Appeal (no previous application having been made to the Divisional Court or a judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the Court might make in the matter.

THIS was an action in the Exchequer Division for the specific performance of a parol agreement for the lease of a farm by the plaintiff to the defendant. The defendant was let into possession of the farm on the 25th of May, 1875, but on the 6th of August he refused to accept a lease, and repudiated the agreement. The action was tried at Lewes on the 9th of March, 1876, before Lord Coleridge, C.J., when the jury found a verdict for the plaintiff with 656*l.* damages. The judge reserved judgment, and on the 20th of March the plaintiff gave notice of motion for judgment. On the 27th of April the defendant obtained an order nisi for a new trial, on the ground of misdirection, and that the verdict was against the weight of the evidence. The two motions were heard together on the 17th of May by a Divisional Court, consisting of Kelly, C.B., and Cleasby, B., when it was ordered that judgment should be entered for the defendant. On the 21st of June the plaintiff gave notice of appeal from this order, and the appeal was set down. On the 27th of July the plaintiff, by special leave of the Court of Appeal, gave notice of motion in the Court of Appeal for the appointment of a receiver and manager of the farm (no previous application had been made to the Divisional Court or to a judge). An affidavit, made by the plaintiff, stated that since October, 1875, nothing had been done by way of cultivating the farm, and that it was in very bad condition and daily getting worse, that there was a crop of grass of some value,

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and that to enable the farm to be cropped and cultivated for next year it was necessary that immediate steps should be taken.

Langworthy and *Bompas*, for the plaintiff. The plaintiff is afraid that he may be prejudiced if he takes possession of the property without the order of the Court. But he is willing to act as receiver and manager.

R. A. McCall, for the defendant. The plaintiff ought to give security.

JAMES, L.J. I do not see why security should be required. The plaintiff will only have to incur expenditure. We will appoint him receiver and manager, he undertaking to abide by such order as the Court may think fit to make in the matter.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for plaintiff: *Parkers.*
Solicitors for defendant: *Tilleard, Godden, & Holme.*

April 27.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

THE VAN MINING COMPANY, LIMITED, AND ANOTHER, APPELLANTS; THE OVERSEERS OF LLANIDLOES AND OTHERS, RESPONDENTS.

Poor-rate—Lead Mine—Royalty reserved wholly in Kind—Option of Lessor to receive Royalty in Money—The Rating Act, 1874 (37 & 38 *Vict. c.* 54), *ss.* 7, 8, 13.

By the Rating Act, 1874, s. 7, provision is made for rating, amongst others, lead mines occupied under leases: by s. 8, the tenant under a lease existing at the commencement of the Act may deduct one-half of the rate from the rent payable by him: by s. 13 the Act is not to apply to mines of which the royalty or dues are "wholly reserved in kind."

A mining company, at the commencement of the Rating Act, 1874, occupied, under a lease from L., a lead mine with engines, machinery, and plant. By the reddendum of the lease, L. was to receive a royalty of a share of the minerals obtained, which at his option was payable in money. The company also occupied two other pieces of land, under separate leases from W. Under one of these leases the reddendum was wholly in money; under the other the reddendum consisted of rent in money, and of a royalty in kind, which at the option of the lessor was payable in money. The pieces of land comprised in the two leases lastly men-

tioned were not worked as mines. The rents had always been paid in money. By an assessment and poor-rate, L. was charged in respect of the royalty paid to him, and the company were charged in respect of the engines, machinery, plant, and surface lands:—

Held, that the assessment and rate were correct; for the property occupied under the lease from L. was of itself a mine within the meaning of the 13th section of the Rating Act, 1874, the lands held under the other two leases not being worked; and as L. would have been chargeable before that statute in respect of the royalty in kind, although he had the option to receive it in money: *Rex* v. *St. Austell* (5 B. & Ald. 693), his liability was preserved by that clause; and the company, as lessees, were chargeable in respect of the engines, machinery, plant, and surface lands.

SPECIAL CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. The appellants were the Van Mining Company, Limited, and the Marquis of Londonderry.

2. The respondents were the churchwardens and overseers of the poor of the parish of Llanidloes and their assistant-overseer, and the assessment committee of the Newtown and Llanidloes Union, in the county of Montgomery.

3. The assessment committee of the Newtown and Llanidloes Union, in June, 1875, assessed the appellants as follows:—

Parish of Llanidloes.

Name of Occupier.	Name of Owner.	Description of Property.	Name of Township or Situation of Property.	Gross Estimated Rental.	Rateable Value.
				£ s. d.	£ s. d.
Marquis of Londonderry	Marquis of Londonderry	Lead Mine and the Royalty or Dues wholly reserved in kind	Van Mines	5849 12 8	5849 12 8
Van Mining Co., Limited	Van Mining Co., Limited	The Engines, Machinery, Workshops, Tramways, and other Plant and Buildings and Works, and Surface of Land occupied in connection with and for the purposes of the Mine	Do.	3543 10 0	2993 0 0

4. The overseers of the poor of the parish of Llanidloes, on the 3rd of July, 1875, made a poor-rate at one shilling in the pound

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on the appellants respectively on the basis of the foregoing assessment.

5. The present appeal was from the said assessment and rate.

6. The Van Mining Company, Limited, were the lessees of certain lead mines known as the Van Mines, situated in the parish of Llanidloes, and in the above-mentioned union and county.

7. These mines were occupied and worked by the Van Mining Company, Limited, under three leases.

8. The first lease (1), dated the 11th of April, 1864, was from Earl and Countess Vane to Messrs. Edward Morris and Joseph Howell, which, by subsequent assignments, had become, and was then, the property of the appellants, the Van Mining Company, Limited. The reddendum in this lease was the royalty of one full fourteenth part or share of the minerals had or obtained under it, when ready for smelting and merchantable on the banks of the said works, or, at the option of the lessors, in lieu thereof, the full value thereof in money.

9. The second lease, dated the 25th of March, 1870, was from Sir Watkin Williams Wynne, Bart., to the Van Mining Company, Limited. The reddendum in this lease was wholly in money.

10. The 3rd lease, dated the 29th of September, 1871, was from Sir Watkin Williams Wynne, Bart., to the Van Mining Company, Limited. The reddendum in this lease was a minimum dead rent of 100*l.* in money, and also one-tenth of the ores and minerals which should be got and raised out of the premises, or, at the option of the lessor, the value thereof in money after the same should have been washed, dressed, and made merchantable. The appellants had not raised any ores or minerals out of the premises contained in this lease, but had been and were working under the same. They also worked a quarry, and had a magazine for dynamite thereon, and the same intersected and formed the only means of passage from one part to another of the premises held under the first lease.

12. A watercourse and reservoir mentioned in the second lease were occupied with and in connection with and for the purposes of the Van Mines only, but were not comprised within the boundaries of the first lease.

(1) This lease was called in the argument and judgments Lord Londonderry's.

13. The rents reserved by these leases had always been paid in money.

14. The mines were and always had been worked by means of a shaft or shafts, and the ore was obtained wholly from underground workings. The shafts were sunk on part of the land comprised within the boundaries of the first lease, and on the said land the engine-houses and other buildings and works connected with the Van Mines were constructed. On the land comprised within the boundaries of the second lease some buildings had been erected and a reservoir constructed, from which reservoir the water was conveyed by watercourses to the mine.

15. The appellants had never before been assessed or rated in respect of this mine, nor the royalty or dues thereof, nor for the machinery or works in connection with it.

16. The respondents contended that the appellant, the Marquis of Londonderry, was liable to be assessed and rated under 43 Eliz. c. 2, as for royalty or dues wholly reserved in kind, and not under the Rating Act, 1874 (37 & 38 Vict. c. 54); and they further contended that the appellants, the Van Mining Company, were liable to be assessed under 43 Eliz. c. 2, for the surface lands comprised in the second lease, and for the shafts, buildings, machinery, reservoir, and watercourses connected with the Van Mines, and they had assessed and rated them accordingly.

17. The appellants contended that the Van Mines should be assessed and rated under the estimate of value and in the manner prescribed by the Rating Act, 1874 (37 & 38 Vict. c. 54), and not under 43 Eliz. c. 2.

18. The Marquis of Londonderry, one of the appellants, contended that he was not liable to be assessed or rated as occupier of the Van Mines, or the royalty or dues thereof.

19. The question for the opinion of the Court was, whether, under the facts and documents above set forth, the premises mentioned in the said leases, or any or which of them respectively, should be assessed and rated under 43 Eliz. c. 2, or the Rating Act, 1874 (37 & 38 Vict. c. 54), or on what principle the same should be assessed and rated.

If this Court should be of opinion that the above assessment and rate were wrong in law, the decision was to be in favour of

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the appellants, and judgment of allowance of the appeal and for the amendment of the assessment and rate was to be entered at the sessions accordingly; but if the Court should be of a contrary opinion, its decision was to be in favour of the respondents, and judgment for dismissing the appeal was to be entered at the sessions accordingly.

Manisty, Q.C. (*C. Crompton* with him), for the appellants. The assessment and the rate based on it cannot be sustained. It may be admitted on behalf of the appellants, that before the Rating Act, 1874 (1), if the rent of a lead mine were paid in kind, that

(1) By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, "Whereas by the Act of the forty-third year of the reign of Queen Elizabeth, chapter two, intituled 'An Act for the relief of the poor,' it is provided that a poor-rate shall be raised in every parish by taxation of, amongst other persons, every occupier of certain hereditaments in such parish; and it is expedient to extend the said Act, and the Acts amending the same (which Act and Acts are in this Act referred to as the Poor-rate Acts), to hereditaments other than those mentioned in the said Act: be it therefore enacted that, from and after the commencement of this Act, the Poor-rate Acts shall extend to the following hereditaments in like manner as if they were mentioned in the recited Act of the forty-third year of the reign of Queen Elizabeth; that is to say . . . . (3.) to mines of every kind not mentioned in the recited Act."

Sect. 7: "Where a tin, lead, or copper mine is occupied under a lease or leases granted without fine on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st day of December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable shall be deducted from the gross value for the purpose of calculating the rateable value.

"In the following cases, namely—

"(1.) Where any such mine is occupied under a lease granted wholly or partly on a fine; and

"(2.) Where any such mine is occupied and worked by the owner; and

"(3.) In the case of any other such mine which is not excepted from the provisions of this Act, and to which the foregoing provisions of this section do not apply; the gross and rateable annual value of the mine shall be taken to be the annual amount of the dues or dues and rent at which the mine might be reasonably expected to let, without fine, on a lease of the ordinary duration according to the usage of the country, if the tenant undertook to pay

is, if part of the ore extracted were reserved for the lessor, he was deemed to be in occupation of the soil and to be rateable: but this was a mere device to escape from the construction put upon 43 Eliz. c. 2; for it had been held that as the only mines expressly rendered rateable in the statute were coal mines, every other kind of mines was exempted (1); and as it was thought anomalous that this distinction should exist, the Courts endeavoured to remove it to some extent by making mines other than coal mines rateable when dues in respect thereof might be paid in kind by the lessee: therefore before the Rating Act, 1874, the assessment upon Lord Londonderry might, perhaps, be sustained, but assuredly the rate upon the company in respect of the machinery and plant used with

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all tenant's rates and taxes, and tithe rent-charge, and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of dues or dues and rent. The purser, secretary, and chief managing agent for the time being of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof.

"In this section the term 'mine,' when a mine is occupied under a lease, includes the underground workings and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling houses), and works and surface of land occupied in connection with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues, or dues and rent, are payable or reserved.

"The term 'dues' means dues, royalty, or toll, either in money, or partly in money and partly in kind; and the amount of dues which are reserved in kind means the value of such dues.

"The term 'lease' means lease or sett, or licence to work, or agreement for a lease or sett or licence to work.

"The term 'fine' means fine, premium or foregift, or other payment or consideration in the nature thereof."

Sect. 8: "Where any poor or other local rate, which, at the commencement of this Act, any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one half of any such rate paid by him.

"Provided that he shall not deduct any sum exceeding what one half of the rate in the pound of such poor or other local rate would amount to, if calculated upon the rent, royalty, or dues so payable by him."

Sect. 13: "Nothing in this Act shall apply to a mine of which the royalty or dues are for the time being wholly reserved in kind or to the owner or occupier thereof."

(1) See *Morgan* v. *Crawshay*, Law Rep. 5 H. L. 304.

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the mine would have been bad (1); and now the old law has been entirely abrogated, and a new principle of rating introduced. The Van Mining Company ought to be assessed under the 7th section, and then under the 8th they might deduct half the rate paid by them from the rent payable by the terms of Lord Londonderry's lease. But the course adopted by the respondents is unjust to the appellants. Lord Londonderry receives the royalty for the mine as increased in value by the plant and machinery used therewith, and is rated on that basis, and yet the company are rated separately in respect of that same plant and machinery.

[BRAMWELL, B. It does not appear that the hereditaments held under Lord Londonderry's lease are rack-rented].

The 7th section applies to a mine "occupied under . . . . leases granted . . . . on a reservation wholly or partly of dues or rent," that is, rent the amount of which is contingent upon the quantity of ore obtained, as opposed to a "fixed rent" afterwards mentioned in the section; and a mine is interpreted to include, when it is occupied under a lease, "the underground workings and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling-houses), and works and surface of land occupied in connection with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues or dues and rent are payable or reserved," and "dues" means a royalty "either in money or partly in money and partly in kind." The Van Mines fall exactly within these terms: they form but one undertaking, although they are held under three leases, and these leases are granted upon a reservation, if not wholly, at all events partly, of dues or rent; for the reddendum of the second lease is entirely in money, and under the third lease a minimum dead rent of 100*l.* is payable to the lessor. It is therefore plain that the assessment and rate ought to have been made under the 7th section; the 13th section, upon which the respondents will rest their argument, does not apply, for it refers only to mines where the reservation is wholly in kind and not to a case like

(1) But see *Talargoch Mining Co.* v. *St. Asaph Union*, Law Rep. 3 Q. B. 478; *Guest* v. *East Dean*, Law Rep. 7 Q. B. 334; *Kittow* v. *Liskeard Union*, Law Rep. 10 Q. B. 7; which seem to overrule *Rex* v. *Bilston*, 5 B. & C. 851.

the present, where the reservations are only partly in kind. But even if the property demised in the first lease is of itself a mine, it is further submitted that, whatever may have been the rule under the former law, there is no reservation in kind within the meaning of the 13th section, for Lord Londonderry had an option to take the royalty in money, and that option he has hitherto elected to exercise.

J. W. Mellor, Q.C. (*Channell* with him), was not called upon to argue for the respondents.

BRAMWELL, B. I think we need not trouble the respondents' counsel. It seems to me that this case is not within the Rating Act, 1874, because in my judgment it is excluded from the operation of that statute by the 13th section. If it were not for this section, there might be great force in the contention on behalf of the appellants, for the other portions of the statute seem to be inconsistent with what has been properly called during the argument a "mere device." But it is admitted to have been the clear law of the land when this statute passed, that the lessor of a lead-mine who received a royalty or dues in kind was rateable under the statute of Elizabeth, and the 13th section appears to have been introduced for the purpose of preserving the rule of law then existing, whenever the royalty or dues are wholly reserved in kind; no injustice is thereby done to the landlord, who remains in the same position as before, and if this section had been omitted injustice might have been done to a tenant under a lease granted before the commencement of this statute; for if a lead mine the royalty for which is wholly reserved in kind were rated under the 7th and 8th sections, the lessor might be relieved from a portion of his chargeability at the expense of the lessee. The only question, therefore, is, do the hereditaments as to which Lord Londonderry is assessed and rated constitute "a mine of which the royalty or dues are for the time being wholly reserved in kind?" This involves the consideration of two points.

First, are these hereditaments "a mine," that is, one mine? I think they are, because the only property from which ore is got is Lord Londonderry's, and though the Van Mining Company occupy also other hereditaments, yet no part of these is at present

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worked as a mine. But, further, although it is not in the view taken by me necessary to express an opinion as to it, I think that if each of the properties leased from Sir W. W. Wynne were likewise worked as a mine, Lord Londonderry would still be rateable, for, in my opinion, the hereditaments demised by each of the leases would constitute a separate mine.

A second point urged upon us on behalf of the appellants is, that the dues are not reserved in kind to the lessor, Lord Londonderry, because he has an option to receive in lieu thereof their full value in money. If we had no authority to assist us, this argument might be difficult to deal with, for the "mere device" was a matter of so anomalous a nature, that it is hard to say how far it ought to be extended; but this objection taken on behalf of the appellants seems to be concluded by authority. It was raised by counsel in *Rex* v. *St Austell* (1), and overruled by the Court of King's Bench. I do not find it expressly alluded to in the judgments, but it was so fully brought under the notice of the judges during the argument that they must have considered and disallowed it. They in effect decided that it made no difference as to the chargeability of the lessor, whether the royalty was reserved simply in kind or with an option to receive its value in money. We are bound to accept this case as a decisive authority, and to hold that the royalty is reserved to Lord Londonderry wholly in kind within the meaning of the 13th section; in my opinion the object of that enactment is to provide that, wherever a lessor would have been liable under the "mere device," he shall remain rateable, and the new mode of rating shall not be adopted as to the mine demised by him. *Rex* v. *St. Austell* (1) shews that Lord Londonderry was liable to be rated when the Rating Act, 1874, came into operation, and although that case was decided fifty years before this statute was passed, it nevertheless affords a key to its interpretation.

For the reasons which I have assigned, I think that Lord Londonderry was properly rated under 43 Eliz. c. 2, pursuant to the 13th section of the Rating Act, 1874, and that he could not have been lawfully rated under the 7th and 8th sections, and I further think that the Van Mining Company were properly rated and assessed in respect of the engines, plant, and other machinery,

(1) 5 B. & Ald. 693.

and also in respect of the surface of the lands comprised in the leases granted by Sir W. W. Wynne. Consequently this appeal must be dismissed.

MELLOR, J. I am entirely of the same opinion. The reasoning of my Brother Bramwell as to the construction of the 13th section is very satisfactory to my mind. It is unnecessary to say whether *Rex* v. *St. Austell* (1) was at the time correctly decided, for it has been accepted as a binding authority and has firmly established a proposition of law adverse to the contention on behalf of the appellants; and I have no doubt that the legislature intended to except from the operation of the Act those mines where the royalty is paid wholly in kind, either without or with an option to the lessor to receive its value in money. I also think that the property contained in Lord Londonderry's lease is a "mine" within the meaning of the 13th section. One mine may extend over the properties of twenty different owners; and in my opinion each property may be a "mine" within the meaning of the 13th section.

DENMAN, J. I am of the same opinion. The main object of the Rating Act, 1874, was to make certain kinds of property, including mines, rateable, which were not rateable before it was passed; it therefore contains many clauses as to the rights existing between landlords and tenants, and as to the deductions to be made from rates in favour of the person who pays them pursuant to the statute. But it was considered expedient by the legislature to leave untouched certain cases where, before the statute, mines were rateable by reason of the terms existing between the owner and the occupier; and to effect this object the 13th section was inserted. I agree that this clause is carried out in its real intention by the construction put upon it by the other members of the Court, in whose judgments I entirely concur.

Judgment for the respondents.

Solicitor for appellants: *T. H. Harrison.*

Solicitors for respondents: *Milne, Riddle, & Mellor, for Williams, Gittins, & Taylor, Newtown, Montgomeryshire.*

(1) 5 B. & Ald. 693.

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May 11.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

BLAKE, APPELLANT; BEECH, RESPONDENT.

Procedure before Justices—Conviction without Information or Summons of Person arrested under Warrant—Gaming-house—Betting-house.

4 QBD 620
621-6-8
631-5
8 QBD 155

The respondent laid an information before a justice that a house was "kept or used as a common gaming-house" within the meaning of the "Act to amend the Law concerning Games and Wagers" (8 & 9 Vict. c. 109), and thereupon the justice granted a warrant under which the appellant was arrested at the house in question. He was brought before two justices, and charged under the "Act for the Suppression of Betting-houses" (16 & 17 Vict. c. 119), s. 3, as "the person," who "having the management of a room" in the house, used it "for the purpose of betting with persons resorting thereto." No information was laid, nor was any summons issued, under the last-named statute; and the appellant did not waive this omission. The charge having been heard he was convicted, and a penalty was imposed:—

Held (per Cleasby, B., and Grove, J.; Field, J. dissenting), that the conviction was wrong, and must be quashed.

Appeal not prosecuted 11 Q.B.D. 55

CASE stated by two justices of the peace for the borough of Bolton, in the county of Lancaster, under 20 & 21 Vict. c. 43.

1. At a petty sessions holden on the 23rd of October, 1875, the appellant was brought before the justices, with other persons, by virtue of a warrant granted by W. H. Wright, a justice for the borough, under the authority of s. 11 of 16 & 17 Vict. c. 119 (1),

(1) By s. 3 of 8 & 9 Vict. c. 109, which is intituled "An Act to amend the Law concerning Games and Wagers," "it shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, room, or place to be kept or used as a common gaming-house, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any constable, to enter, with such assistance as may be found necessary, into such house, room, or place, ... and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all . . . persons found therein: . . . . and any such warrant may be in the form given in the first schedule annexed to this Act."

The form of warrant given in the first schedule directs constables to search for instruments of unlawful gaming, and to arrest the keepers of, and persons playing in, a common gaming-house.

By s. 1 of 16 & 17 Vict. c. 119, which is intituled "An Act for the Suppression of Betting-houses," "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed

the appellant and the other persons being found in a certain house within the borough, alleged to be used for the purpose of betting upon horse-races. The warrant was as follows:—

"Borough of Bolton, in the county of Lancaster, to wit.

"To the constables of the borough of Bolton in the said county,

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by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of, or relating to, any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

Sect. 2: "Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, 'to amend the Law concerning Games and Wagers.'"

Sect. 3: "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the non-payment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months."

Sect. 4: "Any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management, or in any manner assisting in conducting the business thereof, who shall re-

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and to all other peace officers in the county aforesaid: Whereas it appears to me, William Henry Wright, Esq., one of the justices of our lady the Queen assigned to keep the peace in the said borough, by the information on oath of Thomas Beech, of the said borough, chief constable, that the house known as the Angel,

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ceive directly or indirectly any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay such penalty, not exceeding fifty pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the non-payment of such penalty and costs, or, in the first instance, if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding three calendar months."

Sect. 11: "It shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, office, room, or place to be kept or used as a betting-house or office, contrary to this Act, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any constable or police officer to enter, with such assistance as may be found necessary, into such house, office, room, or place, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises; and any such warrant may be according to the form given in the first schedule annexed to the before-mentioned Act, 'to amend the Law concerning Games and Wagers.'"

Sect. 17: "No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done, in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to prosecute such suit, information, or other proceeding to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage then within three calendar months next after the doing of such damage shall have ceased."

situate in Churchgate, in Great Bolton, in the said borough, is kept or used as a common gaming-house within the meaning of an Act passed in the 8th and 9th years of the reign of her present Majesty intituled 'An Act to amend the Law concerning Games and Wagers;' this is, therefore, in the name of our lady the Queen, to require you, with such assistants as you may find necessary, to enter into the said house, and, if necessary, to use force for making such entry, whether by breaking doors or otherwise, and to arrest, search, and bring before me, or some other of the justices of our lady the Queen, assigned to keep the peace within the said borough, all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises, to be dealt with according to law; and for so doing this shall be your warrant. Given under my hand and seal, at Great Bolton, in the said borough, this 15th day of October, A.D. 1875.

"W. H. Wright. (L. S.)"

2. The appellant was charged under the 3rd section of the said Act, 16 & 17 Vict. c. 119, for that he "on the 17th day of October, 1875, at the borough aforesaid, being the person having the management of a room in a certain house called the Angel, situate in Churchgate, in Great Bolton, in the said borough, did use such room for the purpose of betting with persons resorting thereto upon certain events and contingencies relating to certain horse-races, contrary to the form of the statute in such case made and provided."

3. The evidence given before the justices was as follows in regard to the appellant:—On Sunday, the 17th of October, 1875, at about 7 o'clock in the evening, a number of police officers of the borough, in pursuance of the warrant before mentioned, went to the public-house called the Angel, in Churchgate, kept by J. P. Weston. In a room behind the vaults, which was not open to the street, they found the appellant and sixteen other persons. There were cushioned seats all round the room. At the time the police entered, the appellant was on his feet at one end of the room; at the point where the appellant stood, there was a seat with arms to it. Upon the officers entering, the appellant put his hands behind him; his hands were seized, and he then dropped on

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the floor a book and a piece of paper; the book was picked up, and was found to contain memorandums relating to betting. The house was searched, and the following were found therein: three telegrams relating to horse-races, which were directed to the appellant, *Weekly Turf Record*, an ivory tablet upon which the appellant stated would be found a few bets. In the pocket of a coat belonging to the appellant were found a betting list and four telegrams addressed to the appellant. Upon the appellant was found 17*l.* 17*s.* 10*d.* in money, and a cheque for 5*l.* 2*s.*

4. The licensee of the house, or usual landlord, J. P. Weston, was away from home at the time, but the appellant stated that he was the manager of the place.

5. Two of the persons, who were respectively named Simpson and Cullen, found in the room, also gave evidence; they had been arrested along with the appellant, but upon the application of the police were discharged to enable them to become competent witnesses for the prosecution. Cullen stated that on Sunday, the 17th of October, he paid the appellant 3*l.* for money that he owed him in respect of a bet made on the Cesarewitch race, which had then taken place some weeks previously, and there was no evidence that such bet had been made at the Angel. Simpson stated that on the same night he was in the house and room, and asked the appellant what he would lay against a horse called "Sutton," and the appellant said he would lay 8 to 1; the witness said he would take 16 to 2, and the appellant said "All right, I'll lay it you." The witness understood the bet to be 16*l.* to 2*l.* The horse "Sutton" was to run in the Cambridgeshire race, which was to come off that week or next.

6. The appellant's solicitor contended,—1. That under s. 17 of the before-mentioned Act, 16 & 17 Vict. c. 119, one calendar month's notice of action should have been given before taking the proceedings. 2. That after the issuing of the aforesaid warrant an information ought to have been laid, and that a summons embodying the substance of such information ought to have been delivered to the appellant.

7. The justices, however, considered that the notice required by the 17th section had no application to the present proceedings. They also thought it was due to the defendant to have the in-

formation, but they did not think it was sufficient ground for a discharge.

8. The justices found the charge to be proved against the appellant, and convicted him in the penalty of 100*l.*

The questions for the opinion of the Court were, 1. Whether under the 17th section of 16 & 17 Vict. c. 119, one calendar month's notice in writing of the proceedings should have been given to the appellant before prosecuting the same; 2. Whether, after issuing the warrant as aforesaid and apprehension of the parties, it was necessary to lay an information and issue a summons to the appellant embodying the substance of such information. If it should be the opinion of this Court that the justices were wrong in their decision, then judgment was to be given in favour of the appellant.

Feb. 3, 4. *T. H. Baylis, Q.C.* (*T. W. Wheeler* with him), for the appellant. The first question raised in the case must be admitted to be unarguable; the words of 16 & 17 Vict. c. 119, s. 17, protect only persons who have made a mistake in endeavouring to put in force the provisions of the statute; they do not apply to proceedings against persons charged with a breach thereof.

As to the second question, it is submitted that in the absence of an information and summons alleging an offence against 16 & 17 Vict. c. 119, s. 3, the conviction cannot be sustained. The proceedings ought to be strictly regular, for the appellant was arrested under a warrant, which, if it had not been made legal by 8 & 9 Vict. c. 109, s. 3, and sch. 1, would have been void by the common law, owing to the omission to describe therein by name the supposed offenders. (1) It is sufficient to point out that the warrant was granted in pursuance of one statute, 8 & 9 Vict. c. 109, and the appellant was convicted under another, 16 & 17 Vict. c. 119.

The Court called upon

R. G. Arbuthnot, for the respondent. It is submitted that the warrant being properly issued was of itself a sufficient foundation for the subsequent proceedings; the appellant being lawfully

(1) As to the illegality of general warrants at common law, see *Leach* v. *Money*, 19 How. St. Tr. 1001; 3 Burr. 1692, 1742; 1 Wm. Black. 555; Broom's Const. Law, 525; and *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; Lofft. 1; Broom's Const. Law, 548.

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brought before the justices, they had jurisdiction to convict him of any offence which he could be proved to have committed against 16 & 17 Vict. c. 119: *Reg.* v. *Shaw* (1); *Reg.* v. *Fletcher.* (2)

[CLEASBY, B. Those cases merely shew that the accused person may submit to the jurisdiction of justices, and may waive an irregularity in the proceedings against him (3); but here the absence of an information and of a summons founded thereon was not waived.

GROVE, J. The maxim Volenti non fit injuria extends even to criminal proceedings; but the facts of the present case do not admit of its application.]

It is conceded for the respondent that the absence of an information and a summons founded thereon was duly insisted upon on the appellant's behalf; but it is a mistake to say that the appellant was arrested pursuant to one statute and convicted under another; all the proceedings were taken under 16 & 17 Vict. c. 119, which in effect incorporates some of the provisions in 8 & 9 Vict. c. 109, and renders them applicable to betting houses; the mention in the warrant of 8 & 9 Vict. c. 109, which relates to gaming-houses, may have been an informality, but the only mode of objecting to it was by applying for an adjournment under 11 & 12 Vict. c. 43, ss. 1, 9: *Turner* v. *Postmaster General.* (4) But, further, it is contended for the respondent, that in the present case no information under 16 & 17 Vict. c. 119, s. 3, or summons was requisite. The warrant was founded upon an information, which justified the magistrate in issuing it; and when a person is arrested upon a warrant he is not entitled, as of course, to a summons before the evidence can be gone into: the appellant was present during the hearing of the charge made against him under 16 & 17 Vict. c. 119, s. 3, and had full opportunity of making his defence, and therefore a summons was wholly unnecessary. (5)

[FIELD, J. In the note to *Crepps* v. *Durden* (6), an information seems to be considered absolutely essential.]

(1) L. & C. 579; 34 L. J. (M.C.) 169.

(2) Law Rep. 1 C. C. R. 320.

(3) See also *Reg.* v. *Smith* (Law Rep. 1 C. C. R. 110.)

(4) 5 B. & S. 756; 34 L. J. (M.C.) 10.

(5) See 1 Burn's Justice of the Peace, tit. Conviction, p. 1127 (30th ed.).

(6) 1 Sm. L. C. 568.

That statement is perhaps too wide; the only use of an information is to put the law in motion, it is not for the benefit of the accused.

T. H. Baylis, Q.C., in reply. In any point of view the appellant was arrested upon one charge and convicted upon another, and therefore the decision of the justices cannot be supported: *Martin* v. *Pridgeon* (1); *Reg.* v. *Brickhall.* (2) In addition to the cases already cited, *Reg.* v. *Hurrell* (3) shews that an information or a summons is necessary to support proceedings before justices. Some of the authorities cited on the respondent's behalf really support the contention for the appellant; no doubt they shew that an irregularity may be waived, but it follows from them that where an irregularity is not waived by the accused, a conviction cannot be upheld.

Cur. adv. vult.

May 11. The following judgments were delivered:—

FIELD, J. As I differ from my learned Brothers, it is for me to read my judgment first. This is a case stated by two justices of the peace for the borough of Bolton for the opinion of this Court upon certain questions of law.

The facts are, that on the 15th of October, 1875, the respondent, who is the chief constable for the borough, intending to act and acting under s. 11 of 16 & 17 Vict. c. 119, laid a complaint upon oath before a justice of the peace acting for the borough, that a house known as the Angel, was "kept or used as a common gaming-house within the meaning of 8 & 9 Vict. c. 109," and thereupon the magistrate, intending to exercise the power conferred upon him by the same section, issued his warrant to the constables of the borough, by which, after reciting the complaint in the terms above stated, he required the constables, in the terms of s. 11, "to enter into the said house . . . and to arrest, search, and bring before" him "or some other of the justices" (having jurisdiction), "all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises, to be dealt with according

(1) 1 E. & E. 778; 28 L. J. (M.C.) 179. 5 Jur. N.S. 874

(2) 33 L. J. (M.C.) 156. 10 Jur. N.S. 677.

(3) 3 F. & F. 271.

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to law." On the execution, and by virtue of this warrant, the appellant (who was one of the persons found in the house) was brought before two justices, who have stated the present case. When so brought, the appellant was charged, under the 3rd section of the first-mentioned Act (16 & 17 Vict. c. 119) as "the person" who, "having the management of a room" in the Angel, used it "for the purpose of betting with persons resorting thereto." Upon this charge being so made, the appellant's solicitor objected to the hearing and determination of it on the ground (amongst others) that after the issuing of the warrant an information ought to have been laid, and that a summons, embodying the substance of such information, ought to have been delivered to the appellant; but the justices, considering that the appellant was sufficiently informed of the charge intended to be made against him, declined to discharge him, and no application having been made for any adjournment, they proceeded with the hearing and determination of the charge. Witnesses were thereupon called, and examined, and cross-examined; and at the close of the evidence the appellant's solicitor contended that he should be discharged upon the ground above stated, but the justices, upon the evidence, found the charge proved, convicted the appellant in the penalty of 100*l*., and upon the appellant's application stated the present case for the opinion of this Court upon (among other questions) the question whether such information and summons were necessary.

I answer that question in the negative.

The answer to it must depend upon the construction of the statute which creates the offence and gives the justices authority to convict, controlled, it may be, by the provisions of the general law and the statute regulating the procedure in such cases, 11 & 12 Vict. c. 43.

Now, in order to understand the provisions of 16 & 17 Vict. c. 119, it is necessary, first, to observe that by 8 & 9 Vict. c. 109, s. 3, a power was given to a justice of the peace upon complaint upon oath that a house was suspected of being used as a common gaming-house, to issue a warrant (in the form given by that Act) empowering a constable to enter the house and bring before a justice or justices the persons found therein to be dealt

with according to law; and by s. 2 of 16 & 17 Vict. c. 119, a house used for the purposes mentioned in that Act was declared to be a "common gaming-house" within the meaning of 8 & 9 Vict. c. 109. Further, by s. 11 the justices were empowered, upon such complaint on oath, to issue a warrant (which, by the express terms of the section, may be in the form in the schedule to 8 & 9 Vict. c. 109), to bring before the justices, not only the persons found therein to be dealt with according to law, but also, in the terms of the warrant in this case, all "lists, cards, or other documents relating to racing or betting found in such house or premises."

The next thing to consider is, what is the offence charged and what are the powers of the justices to deal with it; and the offence in the present case is created by the 3rd section of the Act, and the jurisdiction of the justices to convict summarily is given by the same section. Now, no doubt, in all cases of summary conviction by justices an information or complaint is necessary, as well to found the jurisdiction of the justices, as also in order that the person charged may be informed of the charge intended to be made against him. But it is equally clear that such information or complaint may be instanter in point of time (*Rex* v. *Fuller* (1)), and need not be in writing or upon oath, unless the statute requires it: *Reg.* v. *Millard.* (2) The statute in question in this case does, in fact, require that the warrant to search the premises and apprehend the persons found therein, which is to be granted upon an ex parte application, shall be preceded by a complaint upon oath, as is almost, if not quite, invariably the case whenever a magistrate is required upon an ex parte application to issue a warrant of apprehension. But in the present instance, inasmuch as the offence to be dealt with is one, like that of gaming, usually committed in secret and under circumstances rendering it ordinarily difficult to say beforehand what the precise offence is and who are the persons who may be found committing it, the statute seems to me to substitute for the ordinarily requisite statement in an information or complaint of the specific person and offence the general allegation of a suspicion that particular premises are used for the purpose of committing the offence, in order that by means of the

(1) 1 Ld. Raym. 509. (2) 1 Dears. 166.

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entry and seizure of cards and lists it may be discovered whether any and what offence has been committed, and who are the persons, if any, committing it. It must be observed, that by the very terms of the warrant the person found in the suspected house (as the appellant was) is, upon being brought before the justices, to be dealt with according to law, i.e. as I read it, a complaint or charge is then to be made against him of some specific offence in order that he may know what he has to answer, and in order that the magistrate's jurisdiction to hear and determine it may thus be founded.

Now in the present case it appears that the charge against the appellant was fully stated in his presence, and I have no doubt that a minute of it was made in writing, although the statute does not require any writing at all. The appellant, therefore, might, if not prepared to answer the charge, have applied for an adjournment, and if he had done so, and the justices had refused it when it ought to have been granted, they would have done wrong; but I cannot think that any further information or complaint was required to give the justices jurisdiction to hear and power summarily to convict under the 3rd section. Then if any such information as is supposed was not required by the statute of 16 & 17 Vict. c. 119, was it rendered necessary by the provisions of 11 & 12 Vict. c. 43? I think not. No doubt, under that statute, where a summons is applied for ex parte, or a warrant is required to be issued either without or after a summons, an information or complaint is necessary; but it seems to me that the special information provided for by 16 & 17 Vict. c. 119, s. 11, fulfils the office which such an information would fill and supersedes its necessity. The absence of a summons seems to me in like manner to form no valid objection to the conviction. The office of a summons is to inform the party to be charged of the offence which he has to meet, and when he has to meet it, and to require his attendance; and the current of modern authority is to shew that if parties are before a magistrate who has jurisdiction as to time and place, no summons or information is necessary: *Reg.* v. *Millard* (1); *Turner* v. *Postmaster General* (2); *Reg.* v. *Shaw.* (3)

(1) 1 Dears. 166. (2) 5 B. & S. 756.

(3) L. & C. 579.

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In the present case the appellant was rightfully brought before the magistrates under the warrant of search and apprehension, and might, I think, be dealt with according to the charge preferred at that time, and of which the magistrates have found that he was sufficiently informed. We were pressed by the counsel for the appellant with the argument, that the effect of supporting the present conviction would be that the appellant would have been brought before a magistrate upon one charge and convicted of another; and in support of this objection the case of *Martin* v. *Pridgeon* (1) was quoted; and this argument has great weight with one of my learned Brethren. But I cannot yield to it. The present conviction does not proceed upon any charge in the information; it proceeds upon the charge made at the hearing. It is to be observed that by the express provision of 11 & 12 Vict. c. 43, ss. 1, 9, no objection can now be made to any variance between an information and the evidence, it being left to the justice to adjourn the hearing of the case to a future day if he is of opinion that by such variance the party charged has been deceived or misled (11 & 12 Vict. c. 43, ss. 1, 9). It is also to be observed that the particular statute of 16 & 17 Vict. c. 119, which gives an appeal by s. 13, also provides (s. 14) that upon such appeal no objection shall be taken to the information for (amongst other things) any insufficiency of statement, if it shall appear to the justices in quarter sessions that the defendant was sufficiently informed of the charge intended to be made against him.

It appears to me, therefore, that, as the charge upon which the appellant has been convicted was actually made, and he was sufficiently informed of it, it was unnecessary, as it certainly would have been useless, to go through the process of laying another formal information or issuing a summons. I think that the objection to the conviction ought not to prevail; but as my two learned Brethren have come to a different conclusion, the result is that the conviction must be quashed.

CLEASBY, B. We are not considering the liability of persons

(1) 1 E. & E. 778; 28 L. J. (M.C.) 179.

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found in a gaming-house to give sureties under the statute of 33 Hen. 8, c. 9, s. 14 (1), but their liability to a penalty under the statute 16 & 17 Vict. c. 119. The question which has been argued before us is that raised by the second question put to the Court. It was admitted before us, that the objection of the want of a proper information was taken before the case was proceeded with, and that there was nothing in the nature of waiver. The charge made against the appellant was an offence under 16 & 17 Vict. c. 119, for using a room of which he had the management for the purpose of betting with persons resorting thereto. By the 3rd section owners or occupiers, or persons having the management of a house or room, who use it for the purpose of betting, are liable to a penalty not exceeding 100*l.*, and to be sent to prison for six calendar months in case of non-payment. And by the 4th section persons being owners or occupiers, or having the management of any house, room, &c., who receive money or other property as a deposit to be returned on the happening of a certain event, are liable to a penalty not exceeding 50*l.*, and to three months' imprisonment on non-payment.

It is quite clear that the regular way of recovering these penalties would be by information and summons in the ordinary way, with a warrant if summons ineffectual. And this appears from other parts of the Act. Now it is a rule that an information is essential as the foundation of such proceedings: Paley on Convic-

(1) By 33 Hen. 8, c. 9, s. 14, "it shall be lawful to all and every the justices of the peace in every shire, mayors, sheriffs, bailiffs, and other head officers within every city, town, and borough within this realm, from time to time, as well within liberties as without, as need and case shall require, to come, enter, and resort into all and every houses, places, and alleys where such games shall be suspected to be holden, exercised, used, or occupied, contrary to the form of this estatute; and as well the keepers of the same as also the persons there haunting, resorting, and playing, to take, arrest, and imprison, and them so taken and arrested to keep in prison unto such time as the keepers and maintainers of the said plays and games have found sureties to the king's use to be bound by recognizance or otherwise no longer to use, keep, or occupy any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves or else with sureties, by the discretions of the justices, mayors, sheriffs, bailiffs, or other head officers, no more to play, haunt, or exercise from thenceforth in, at, or to any of the said places, or at any of the said games."

tions, 5th ed., p. 64. And it is well settled by decided cases that where the information is for one offence, and where if the defendant appears the charge against him is for another offence, the proceedings are irregular and a conviction cannot be upheld: *Martin* v. *Pridgeon* (1); *Reg.* v. *Brickhall.* (2) Such an irregularity may be waived, as appears by several cases, particularly *Turner* v. *Postmaster General* (3); but in that case the Lord Chief Justice says, (at p. 763): "In strictness the appellant was entitled to insist that there should be an information and summons in pursuance of s. 62, but they waived that, &c." And in *Reg.* v. *Shaw* (4), which was an indictment for perjury, it appeared that in the proceedings in which the perjury was said to have been committed there was no proper information, but a regular summons issued purporting to be founded on a proper information, and the defendants appeared, and the case was tried without any objection; the Court thought the irregularity (if any) was waived, and the jurisdiction sufficiently appeared by the summons.

The irregularity in the present case was not waived, but on the contrary, the objection taken, and the question is whether there was a proper information. The only information was that on which the warrant was issued under 8 & 9 Vict. c. 109, s. 3, namely, for keeping a common gaming-house. But the charge made when the defendant was brought up was a charge which could not be made under 8 & 9 Vict. c. 109, and it was made under 16 & 17 Vict. c. 119. It appears to us that this made the proceedings irregular. It would be extremely inconvenient to enter in each case into the consideration of the similarity or dissimilarity of different charges. It is better, especially in cases involving an imprisonment for six months, to abide by the rule established by the authorities, that the charge must be comprised within the information, and not different from it. I not only accede to these authorities, as I feel bound to do, but I think they rest upon a foundation which cannot be questioned. If this Court has any control over summary jurisdictions, it cannot be better exercised than by insisting that there shall not be such a de-

(1) 1 E. & E. 778; 28 L. J. (M.C.) 179.

(2) 33 L. J. (M.C.) 156.

(3) 5 B. & S. 756.

(4) L. & C. 579; 34 L. J. (M.C.) 169.

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parture from the first principles of criminal justice as that a man shall not be heard in his defence before he is convicted, as would be the result of allowing a man who happened to be in custody to be at once upon his trial for any offence of which he could have had no notice before. If there is a regular information and summons, and the man is afterwards brought up on a warrant, the argument would not apply, because it was his own fault that he had not notice of the charge. And I do not think it any answer to this objection that the accused might, if he required it, apply for delay in order to obtain advice and prepare his defence. If he waives the want of information and summons, it would be the proper course to apply for delay, and it would be in the discretion of the justices to grant it or not, or to what extent they would grant it. And this Court would not interfere with the exercise of that discretion in a proceeding which, by the assent of the man charged, was properly before the magistrates. But it is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings, and when such a question is brought before this Court I conceive one answer only can be given. A proper exercise of the magistrates' discretion in granting delay, if applied for, would no doubt correct the erroneous conclusion of the magistrates in entertaining the case; but no one would contend that a man should be at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial, or that this Court would allow it. In the present case the question is very properly put to the Court by the magistrates themselves.

These observations apply with equal force to the other ground principally argued before us, namely, whether the warrant and arrest under s. 11 dispensed altogether with the necessity of a regular information and summons giving the defendant notice of the charge made against him,—in other words, whether s. 11 is auxiliary to the regular proceedings by information and summons or a substitute for them. It is plain from several sections that the proceedings by information and summons are contemplated; for example, s. 8 begins: "If any person convicted under this Act on information before justices, &c." But s. 10 is more express on the subject. It provides that if any

person who has laid an information does not appear at the time when the defendant has been summoned to appear, he shall be liable to costs, &c. This and other parts of the Act and general considerations of importance, such as have been already referred to, seem to shew that s. 11 was not intended to introduce an exceptional procedure of having a man put on his trial without any previous notice. It is an important section, because, as the purposes for which the house, &c., was used would be difficult of proof, and the person managing the house not known, it enables the magistrate to have the person found there brought up so as to know who ought to be charged.

The view above taken is of a strict and somewhat technical nature; but the question which we have considered has reference not to the proper conclusion of law upon a case properly tried, but to the mode of administering justice; and in administering justice summarily strict regularity must be observed.

As regards the first question put to the Court, it is clear that no notice was necessary, and the objection was founded upon an obvious mistake, and it is a sufficient answer to the other question to say we think for the above reasons that the appellant ought not to have been convicted.

GROVE, J. I agree with the judgment of my Brother Cleasby.

Judgment for the appellant.

Solicitors for appellant: *Chester, Urquhart, & Co., for H. M. Richardson, Bolton.*

Solicitors for respondent: *Gregory, Rowcliffes, & Co., for Hall, Bolton.*

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May 19.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

THE WAKEFIELD LOCAL BOARD OF HEALTH, APPELLANTS; LEE AND ANOTHER, RESPONDENTS.

Street—"Premises fronting, adjoining or abutting"—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 69.

By the Public Health Act, 1848, s. 69, "in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice."

The respondents' premises were divided from D. street by a small stream, but by two bridges over the stream their premises were connected with it; by means of gates they could effectually close all communication. One of the bridges had been moved and reinstated by the respondents. The principal outlet from their premises led into W. Street:—

Held (per Grove and Field, JJ.) that the respondents' premises fronted and abutted upon D. Street within the meaning of the foregoing enactment.

Per Cleasby, B. hesitating, that the premises adjoined D. Street.

CASE stated by justices of the peace for the borough of Wakefield under 20 & 21 Vict. c. 43.

At a petty sessions held on the 10th of March, 1875, a complaint was preferred by the appellants under the Public Health Act, 1848, s. 69 (1), charging that prior to and on the 3rd day of April,

(1) By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be

1872, and thenceforward until after the service of the notice next mentioned, a street called Dyehouse Lane, situate within the district of the appellants' board (not being a highway within the meaning of the statutes in that behalf) was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the said board: whereupon the said board did, on the 15th day of November, 1872, by written notice in the form or to the effect prescribed by the statutes in that behalf, and dated the 3rd day of April, 1872, to the respective owners and occupiers of the premises fronting, adjoining, and abutting upon such part of the same street as so therein required to be sewered, levelled, paved, flagged, and channelled, require the said owners to sewer, level, pave, flag, and channel the said street within six weeks from the service of the said notice in manner in the said notice described; that the said notice was not complied with as by law required; and, therefore, the said board thought fit to execute, and did thereafter execute the works mentioned and referred to therein; that the proportions of the expenses incurred by the said board in so executing the said works to be paid by the respective owners of premises so fronting, adjoining, and abutting as aforesaid, according to the frontage of their respective premises, were afterwards (to wit) on the 27th day of April, 1874, duly settled by the surveyor of the said board, having regard to all the circumstances of the case, and pursuant to the statutes in that behalf; that notice of the amount of the said proportions so settled by the said surveyor was, in accordance with the statutes in that behalf, more than three calendar months before the 3rd day of February 1875, being the day of complaint, namely, on or about the 9th day of June, 1874, duly given to all the said owners, and the respective proportions of the said expenses to be paid by the said owners respectively had theretofore and more than three calendar months before the date of the complaint been duly demanded of all the said owners, but that the respondents, two of the said owners within the meaning

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private improvement expenses, and be recoverable as such in the manner hereinafter provided."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, repeals the Public Health Act, 1848; but s. 150 of the Public Health Act, 1875, contains similar provisions to the enactment above set out.

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of the statute in that behalf made, had not paid, but had refused to pay their proportion of the expenses so due from them as aforesaid, amounting to the sum of 145*l.* 13*s.* 5*d.*, nor had paid, but had refused to pay the interest in respect of the said sum by law payable by them to the said board, and had not, within the time limited by the statute in that behalf and in manner thereby prescribed, disputed the same; and that there was therefore then due from them to the said board in respect of the premises the said sum of 145*l.* 13*s.* 5*d.*, and the further sum of 4*l.* 14*s.* 4*d.* for interest on the said first-mentioned sum pursuant to the statute in that behalf, making together the sum of 150*l.* 7*s.* 9*d.* Wherefore it was prayed that proceedings might be taken on behalf of the said board for recovery thereof.

At the hearing the respondents' solicitor admitted the regularity of the preliminary proceedings taken by the board, and that Dyehouse Lane was a street repairable by the owners of property fronting, adjoining, or abutting thereupon.

The street called Dyehouse Lane was situate within the appellants' district, and on the east side of the stream called the River Chald or Ings Beck, which divided the townships of Wakefield and Alverthorpe-with-Thornes, and also divided the premises of which the respondents were owners from Dyehouse Lane. There were two communications with the respondents' premises out of Dyehouse Lane and over the beck by means of two bridges. One of these bridges was made of brick, arched over the beck, and might be used by horses, carts, and other carriages, and by foot-passengers. The other bridge was a wooden foot-bridge, and could only be used by foot-passengers. The respondents had gates on their own premises, by means of which they could at their own will and pleasure effectually close all communication between their premises and Dyehouse Lane, and these gates were the only obstructions to the free ingress and egress over the bridges to and from the respondents' premises; but it was stated by one of the respondents that he had known only one cart go over the brick bridge within the last ten years. These bridges had directly communicated between the respondents' premises and Dyehouse Lane for a great number of years, but there was no evidence adduced shewing by whom they were erected. It was proved that they

had been in existence for fifty years or upwards, and it was also proved that the wooden foot-bridge was removed by the respondents at their own cost from its original position some seven or eight years ago, and that it still communicated between their premises and Dyehouse Lane. It was not proved by whom either of the said bridges had been repaired, or that they had ever been repaired by the respondents, except so far as the wooden foot-bridge was altered and repaired by them on its removal as aforesaid.

The respondents admitted that they had cleansed or paid for the cleansing of the stream called Chald or Ings Beck up to the middle thereof co-extensive with their premises. The respondents proved that the principal entrance used to their premises was from the street called Westgate, in Wakefield, and not from either of the bridges.

The appellants contended, through their counsel, that the Chald or Ings Beck, was a fence bounding the respondents' property; and that, as the respondents had two communications from Dyehouse Lane over the beck by means of an arched bridge for carts as well as foot-passengers, and a wooden bridge for foot-passengers, their premises fronted, adjoined, or abutted upon Dyehouse Lane, in respect of the whole of the frontage of their premises co-extensive with the stream called Chald or Ings Beck.

The respondents contended through their solicitor that no part of their property fronted, adjoined, or abutted upon Dyehouse Lane, and produced a conveyance, dated the 11th of July, 1845, of the land and premises in respect of which the present claim was made: upon the conveyance was indorsed a plan of the premises purporting to be thereby granted. According to this plan, the land of the respondents extended only as far as the bank of the stream next their property. They further contended that no part of the stream called Chald or Ings Beck, or the two bridges crossing over it, formed part of the premises in the said conveyance mentioned; that, as the principal entrance to their premises was from the street called Westgate, they could not be owners of premises fronting, adjoining, or abutting upon Dyehouse Lane within the meaning of the Act; that the centre of the stream formed the boundary between the township of Wakefield and the township of Alver-

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thorpe-with-Thornes, and that, supposing the respondents had any right to the stream, it would only be as an easement to the centre thereof in the township of Wakefield, and that the other half of the said stream would therefore front, adjoin, and abut upon Dyehouse Lane in the township of Alverthorpe-with-Thornes; that the respondents could not maintain an action for damages done to the bridges crossing the stream, and that under the circumstances they could not be held liable to pay any proportion of the cost of repairing Dyehouse Lane, it being divided from their premises by the stream as before mentioned.

The appellants' counsel argued in reply that, if the respondents were owners up to the middle of the stream, it was quite clear that they were owners up to the street, for the other half of the stream from the centre thereof was portion of the street, and therefore the respondents' premises fronted, adjoined, and abutted upon Dyehouse Lane.

The justices dismissed the complaint.

The question of law arising upon the foregoing case was, whether the respondents were liable to pay to the appellants a portion of the cost of sewering, levelling, paving, flagging, and channelling Dyehouse Lane.

May 18. *John Forbes*, for the appellants. The decision of the justices in dismissing the complaint was wrong. The respondents' premises fronted, adjoined, and abutted upon Dyehouse Lane. The authorities bearing upon the subject support the contention for the appellants: *School Board for London* v. *Vestry of St. Mary, Islington* (1), and *Baddeley* v. *Gingell* (2), are conclusive in their favour. *Reg.* v. *Newport Local Board of Health* (3), establishes that the question of direct benefit is not material, and *Mayor, &c., of Manchester* v. *Chapman* (4), shews that even a wall standing on the respondents' own ground would not separate their land from Dyehouse Lane so as to exempt them from liability.

Sanderson Tennant, for the respondents. The facts in the authorities cited on behalf of the appellants do not resemble those in the present case. The respondents have only an easement over the

(1) 1 Q. B. D. 65.
(2) 1 Ex. 319.
(3) 3 B. & S. 341; 32 L. J. (M.C.) 97.
(4) 37 L. J. (M.C.) 173.

stream, and cannot be charged in respect of it. *Oldaker* v. *Hunt* (1), which at first may seem to shew that the respondents are adjoining owners, really turned upon the meaning of the word "interested" in the Public Health Act, 1848, s. 145. But even if the respondents were seised of the whole bed of the stream, they would not be such owners of land as are liable to be charged, for they derive no benefit from their ownership: *Plumstead Board of Works* v. *British Land Co.* (2)

John Forbes replied.

Cur. adv. vult.

May 19. The following judgments were delivered:—

CLEASBY, B. The question to be decided is whether the respondents' premises have been brought within the terms of the 69th section of the Public Health Act, 1848, and whether they can be said to be "fronting, adjoining, or abutting upon" Dyehouse Lane. The material facts may be shortly stated as follows: A narrow stream runs between the respondents' premises and Dyehouse Lane. It seems clear that the whole of the bed of this stream does not belong to the respondents, and the evidence before us tends to shew that their property does not extend further than the edge of the bank next their land. Two bridges form the means of communication between the respondents' premises and the street; one of them is of brick, but it was not clearly proved to whom it belonged; it had been only once crossed by a cart during ten years. The other bridge was of wood, and appeared to belong to the respondents, for they had removed it, and this act could only be justified on the ground of ownership. The respondents could for all practical purposes prevent any one from using the bridges without their consent. Upon these facts we have to determine whether the respondents are liable to pay the amount claimed from them. I do not consider the words used in the statute synonymous; I think that they were carefully inserted, and that they have distinctive meanings. I think that the respondents' premises do not "abut" upon Dyehouse Lane, because

(1) 6 D. M. & G. 376. Jun 15 1876 plaining *Lord Northbrook* v. *Plumstead*
(2) Law Rep. 10 Q. B. 203; ex- *Board of Works*, Law Rep. 7 Q. B. 183.

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the stream intervenes between them, and I do not think the bridges make any difference as to this. I may remark that if the respondents' premises do either front, adjoin, or abut upon Dye-house Lane, they will not be exempt from liability upon the ground that for practical purposes they gain no benefit from their proximity to the lane: owners and occupiers falling within the provisions of the statute are to be assessed according to their frontages, and the argument that those who derive no advantage are not bound to pay is not warranted by the words of the statute. This seems to be established by *Reg.* v. *Newport Local Board of Health.* (1) I hardly think that upon the facts stated the respondents' premises fronted the lane. The most important word is "adjoining." Now it seems to me that, as the stream is very small, the premises are not really separated from the lane, and may be said to adjoin. The question is substantially of fact, and the answer might be different if the stream had been so broad and deep as to require to be crossed in a ferry. I should be much disposed to abide by the view of the justices who had before them the materials for arriving at a proper conclusion, and to refrain from overruling their decision; but, as my learned Brothers concur in holding the judgment of the magistrates to be wrong, I do not dissent from the conclusion to which they have come. In my opinion, with the exception of the case which I have already mentioned, the authorities cited in the course of the argument do not throw any light upon the question before us. The decision in *Baddeley* v. *Gingell* (2) turned upon the words of a different statute; the question was whether certain premises could be said to lie within a street; it depended chiefly upon the circumstances that they had some frontage to it, and that the only mode of access to them was from the street. In *School Board for London* v. *Vestry of St. Mary, Islington* (3) the judges considered it the most material circumstance for their decision that the appellants' ground had no other outlet except by passing into a street, and therefore they held that the buildings standing upon the appellants' ground formed the street, though they were separated from

(1) 3 B. & S. 341; 32 L. J. (M.C.) 97.

(2) 1 Ex. 319.

(3) 1 Q. B. D. 65.

it. The facts of the present case are widely different, and consequently *Baddeley* v. *Gingell* (1) and *School Board for London* v. *Vestry of St. Mary, Islington* (2) have no bearing upon it.

GROVE, J. In my opinion the appellants are entitled to judgment. I quite admit that if the question to be decided were really of fact, we ought not to interfere with the decision of the magistrates; but what we have to determine is whether, upon the facts stated, the respondents' premises are really "fronting, adjoining, or abutting upon" Dyehouse Lane. Except in mathematics, it is difficult to frame exhaustive definitions of words; they must be construed with reference to the subject-matter to which they are applied. Now it is to be observed that the narrow stream is crossed by two bridges, and that these bridges are under the control of the respondents. There is for practical purposes no division by intervening land, and I think that the respondents' premises may be said in popular language to abut upon the lane, for the bridges, so far as appears, are useful only to them; and I also think that they may be said to front the lane; and further, I do not say that they may not adjoin.

I think that we may derive some assistance from the authorities cited before us. *Baddeley* v. *Gingell* (1) went much further than is requisite to support the view which I take; the houses rated in that case were situate in a yard, and were separated from the street by other buildings, and yet they were held to be within the street; the property of the present respondents is not divided from Dyehouse Lane by any intervening erections. A similar remark is applicable to *School Board for London* v. *Vestry of St. Mary, Islington.* (2) It was there held that buildings separated from a street by intervening houses "formed" the street, and the Lord Chief Justice seemed to be of opinion that "forming a street" must receive much the same construction as "within a street." Now if we take the view least favourable to the appellants, and if we hold that the respondents' property does not extend beyond the bank immediately adjoining thereto, I still think the premises "front" and "abut upon" Dyehouse Lane: nothing like a wall or a fence exists between them. I think that the words of

(1) 1 Ex. 319. (2) 1 Q. B. D. 65.

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the statute must be construed in their ordinary meaning, and that the facts of the present case fall within them.

My Brother Field, who was present during the argument of this case, concurs in the result at which I have arrived, although he may not fully agree with all my reasons.

Case remitted to Justices.

Solicitors for appellants: *Pitman & Lane, for Brown, Wilkin, & Scott, Wakefield.*

Solicitor for respondents: *George Badham, for J. & J. E. Marsden, Wakefield.*

May 20.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

THE MAYOR, ALDERMEN, AND BURGESSES OF SCARBOROUGH, APPELLANTS; THE RURAL SANITARY AUTHORITY OF THE SCARBOROUGH POOR LAW UNION, RESPONDENTS.

Nuisance—Abatement—Prohibition—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 91, 94, 96.

The appellants, who were the urban sanitary authority of S., deposited in a field ashes and refuse collected in S., in order that the same might be removed by certain farmers, with whom they had contracted for the purchase thereof: the appellants were not the owners or tenants of the field, and they exercised no control over the ashes and refuse after the same were deposited: the deposit formed a nuisance. An order was made under the Public Health Act, 1875, s. 96, by justices against the appellants, for the abatement of the existing nuisance and for the prohibition of its recurrence:—

Held, that so much of the order as directed an abatement was bad, for it prescribed an act, the execution of which might involve the committal of a trespass; but that so much of the order as prohibited a recurrence was good, for it was the appellants' act which created the nuisance.

CASE stated by two justices of the peace for the North Riding of Yorkshire, under 20 & 21 Vict. c. 43.

At a petty session holden at Scarborough on the 23rd of March, 1876, a complaint was heard, charging that on the 19th of February then last there existed in or upon premises situate at Stone Haggs, in the township of Seamer, a nuisance, to wit, a deposit of foul manure, which was caused by the act of the appellants, who were the urban sanitary authority for the borough. At the hearing

it was proved that a deposit of foul manure existed in a field situate at Stone Haggs, in the township of Seamer, between the 27th of December, 1875, and the 19th of February, 1876; that the field was in the occupation of Ann Woodall and adjoined the high road; that the heap of deposit was near to the fence adjoining the road, and about one hundred and fifty yards from the line of railway from Scarborough to York; that the appellants by their servants, carts, and horses, led the manure and deposited it in the field in question; that there was a large daily traffic on the road adjoining the field containing the deposit, and that complaints had been made to the inspector of nuisances by persons using the road in question. It was also proved that the deposit was a nuisance, and injurious to health, and was so from the time it was tipped from the appellants' carts into the field.

On the part of the appellants it was proved that their foreman of the scavenging department had contracted for the sale of ashes, manure, and refuse collected in Scarborough to six farmers in Seamer and its neighbourhood, and for delivery thereof to them in the field in question; that the appellants had no interest either as owners or tenants of such field, but that the purchasers of the ashes paid the tenant for the use of the field for the purpose, and that the purchasers agreed to lead the ashes away to their respective farms as soon as possible after delivery thereof by the appellants, or otherwise to cover up the ashes so as to prevent a nuisance; that the purchasers contracted to pay the appellants an agreed sum for every ton of ashes delivered in the field, and that after delivery thereof the ashes remained subject to the exclusive order of the respective purchasers; that the deposit referred to in the complaint was made by authority of the appellants under the contract above mentioned, and by the order of the purchasers.

On the part of the respondents it was urged that the appellants having themselves, by their servants and vehicles, led and deposited the manure in the field in question, were liable, and that under s. 255 of the Public Health Act, 1875, which provides that, where any nuisance appears to be wholly or partially caused by the acts or defaults of two or more persons, proceedings may be taken against any one of them, the appellants, notwithstanding any default on the part of the farmers contributing to increase the

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nuisance, might be called upon to abate the same, and the recurrence thereof might be prohibited.

On the part of the appellants it was contended that, as they deposited the ashes in the field under the contract referred to and by order of the purchasers, upon the deposit the delivery was complete to such purchasers, and that after the delivery the appellants ceased to have control or responsibility in respect of such deposit; and that as they were neither owners nor occupiers of the field, the appellants had themselves no power to remove the deposit or to comply with any order which might be made for the abatement of the nuisance complained of.

The justices adjudged the charge to be proved, and ordered the appellants, within one calendar month from the date of their order, or a true copy thereof, to abate the nuisance by covering over or disinfecting the deposit, or so much thereof as then remained in the field, so that the same should no longer remain a nuisance or injurious to health. And the justices being satisfied that, notwithstanding the nuisance might be abated, the same was likely to recur on the premises, did by the same order prohibit the appellants from causing or permitting any foul manure or other matter to be deposited upon the said premises in such manner as to cause the recurrence of the nuisance. The question submitted for this Court was, whether on the facts above stated the appellants were liable to be called upon to abate the nuisance complained of, in manner and form as directed in the said order, and thereafter to discontinue the delivery of the ashes on the field in question.

If the Court should be of opinion that the order had been legally and properly made, and the appellants were liable as aforesaid, then the order was to stand; but if the Court should be of a contrary opinion, then the complaint was to be dismissed.

A. W. Simpson, for the appellants. The order is wholly bad, and cannot be maintained under the Public Health Act, 1875, ss. 91, 94, 96. (1) The appellants did not create the nuisance complained

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91, "For the purposes of this Act . . . (4.) any accumulation or deposit which is a nuisance or injurious to health . . . shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this Act: provided, first,

of; no evidence appears to have been given that the manure was offensive whilst it was conveyed to the field, and the tipping was a matter which lasted but for an instant, and after the tipping the appellants had no control over the deposit; but by this order they are made liable for the negligence of the purchasers in allowing the deposit to accumulate; the reasoning of Bramwell, B., in *Murphy* v. *Caralli* (1), is very much in the appellants' favour.

[CLEASBY, B. The manure is a nuisance from the very moment when it is tipped at the heap.]

The appellants are not tenants of the field; and the authorities shew that it is only the occupier of the place where a nuisance exists who can be held responsible for injury arising therefrom; even a lessor is not liable for a nuisance during the currency of the lease, unless perhaps he has let the property knowing that the nuisance then existed: *Gwinnell* v. *Eamer.* (2) The appellants have not been guilty of any wrong, and, therefore, no duty is imposed upon them to take care of the manure after it has passed out of their possession: *Brown* v. *Mallett.* (3) They are a public body discharging duties important to be fulfilled for the public

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that a penalty shall not be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on any business or manufacture, if it be proved to the satisfaction of the Court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business or manufacture, and that the best available means have been taken for preventing injury thereby to the public health."

Sect. 94: "On the receipt of any information respecting the existence of a nuisance the local authorities shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Sect. 96: "If the Court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance, and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance."

(1) 3 H. & C. 462, at p. 466.

(2) Law Rep. 10 C. P. 658.

(3) 5 C. B. 599.

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benefit; and if the order of abatement and prohibition be allowed to stand, they will be seriously hampered in the performance of the functions assigned to them.

[GROVE, J. So far as appears from the statements in the case, the appellants may take other means of disposing of the ashes and refuse collected in Scarborough, and may thereby avoid the creation of a nuisance. They cannot rely upon the maxim, Nemo tenetur ad impossibilia.]

James Paterson, for the respondents.

[CLEASBY, B. That part of the order which relates to a prohibition of the recurrence of the nuisance appears to be good; but it seems difficult to support that part which directs an abatement.

GROVE, J. How is an order to be enforced which perhaps cannot be obeyed without committing a trespass? (1)]

In *Brown* v. *Bussell* (2) an order was upheld directing the appellant to abate a nuisance which did not exist upon his own land.

[GROVE, J. That case is not in point; for there the appellant was to execute upon his own premises what was necessary to prevent the nuisance; here the appellants have no power to go into the field to remove or cover up the deposit without the occupier's consent.]

If the order stands as to the abatement, the appellants will probably find means to comply with it.

CLEASBY, B. The order consists of two parts, the one as to abatement, the other as to prohibition; I think the former clearly bad, the latter clearly good. Upon the facts stated, it is quite plain that a nuisance was created by the appellants; the deposit of the manure necessarily involved the accumulation of matter injurious to the public health: the act of depositing the ashes and refuse was the act of the appellants, and therefore they were rightly directed to discontinue it; but as they are not occupiers of the field, they cannot lawfully be ordered to abate the nuisance by covering over or disinfecting the heap.

(1) In *London and South Western Ry. Co.* v. *Webb*, 15 C. B. (N.S.) 450, the Court of Common Pleas refused to grant an injunction, which could not be obeyed without committing a trespass.

(2) Law Rep. 3 Q. B. 251.

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GROVE, J. I am of the same opinion. It is the duty of the appellants to find some place where the ashes and refuse may be deposited without creating a nuisance; it is not stated in the case that they have taken the best available means for preventing injury to the public, so as to bring themselves within the protection of the first proviso in s. 91 of the Public Health Act, 1875; for anything that appears, many other means may exist whereby the refuse may be carried away from Scarborough without producing inconvenience to any one; therefore the part of the order prohibiting the recurrence of the nuisance must stand. I think, however, that the part directing abatement of the existing nuisance cannot be upheld; for it directs the performance of that which may be illegal. The order is good in part, and also bad in part.

Order quashed as to abatement; confirmed as to prohibition.

Solicitor for appellants: *Lammin.*

Solicitors for respondents: *Sharp & Ullithorne.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

May 26.

READ, APPELLANT; PERRETT, RESPONDENT.

Procedure before Justices—Power to reject irrelevant Evidence—"Obstruction in any Thoroughfare"—Metropolitan Police Act (2 & 3 *Vict. c.* 47), *s.* 60, *subs.* 7.

A penalty is imposed by 2 & 3 Vict. c. 47, s. 60, subs. 7, upon every person "who shall set up or continue any .... projection from any .... part of any .... shop .... so as to cause any .... obstruction in any thoroughfare."

The appellant was summoned before a metropolitan police magistrate for an offence against the foregoing enactment. It was proved that he used affixed to the front of his shop a moveable show-board, 11½ inches of which projected at a height of 2 feet 3 inches over the footway of the street, which was 36 feet 8 inches wide. The appellant proposed to call witnesses to prove that they were not incommoded by the projection; but the magistrate refused to hear them, and convicted the appellant:—

Held, that the magistrate had power to reject the evidence proposed to be adduced as irrelevant, and that the conviction must be affirmed.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

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1. On the 25th of March, 1876, the appellant appeared to answer a complaint charging that he did on the 1st of March, 1876, and on divers other days, set up and continue a show-board, being a projection from the front of the shop No. 40, Pitfield Street, so as to cause an annoyance and obstruction in the said thoroughfare, contrary to the Metropolitan Police Act, 2 & 3 Vict. c. 47.

2. By s. 60, subs. 7, of that Act, a penalty of 40*s.* may be imposed on every person "who shall set up or continue any pole, blind, awning, line, or any other projection, from any window, parapet, or other part of any house, shop, or other building, so as to cause any annoyance or obstruction in any thoroughfare."

3. The appellant was a pork butcher, carrying on his business at No. 40, Pitfield Street, and he used affixed to the front of his shop a show-board being twelve inches in width, eleven and a half of which projected at a height of two feet three inches over the public footway. The show-board was moveable, and was taken down at night and on Sundays. The width of the pavement facing the appellant's shop was seven feet four inches, and the width of the street from the external walls of the houses on either side was thirty-six feet eight inches.

4. It was proposed for the prosecution to call witnesses to prove that they were incommoded by the said projection, and for the defence to call witnesses to prove that they were not so incommoded; but the magistrate declined to hear either set of witnesses, being satisfied by the facts stated in the 3rd paragraph of the case, that the show-board was an obstruction within the meaning of the statute, although he might have come to a different conclusion had the projection been placed above the range of human stature. Accordingly, he ordered the appellant to pay a fine of 10*s.*

The question for the opinion of this Court was, whether the magistrate could lawfully find that the show-board was an obstruction within the meaning of the statute without hearing the witnesses tendered by the appellant.

If the Court should be of that opinion, the conviction was to be affirmed: if not, the case was to be remitted to the magistrate, or dealt with as the Court might direct.

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McIntyre, Q.C. (*Hollings* with him), for the appellant. The question whether the show-board was an obstruction in the thoroughfare was as to a matter of fact, and therefore the magistrate was bound to hear evidence that the board did not cause inconvenience to persons passing along the street; but upon the facts stated in the 3rd paragraph he assumed as matter of law that an obstruction was created, and that the presumption arising upon those facts could not be displaced by the evidence proposed to be adduced. It is submitted that he could not refuse to allow the appellant's witnesses to give evidence, and that the case has not been fully heard by him. But even if the question were one of law, the conviction cannot be upheld; for, by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 26, subs. 2, "in any street or alley of a width greater than thirty feet any shop-front may project ten inches and no more:" in the present case, as the show-board projected only eleven and a half inches in a street of more than thirty feet wide, the supposed obstruction was merely an encroachment of one and a half inches; this is insufficient to support the magistrate's decision; for the maxim applies, De minimis non curat lex.

Lanyon (*H. B. Mugliston* with him), was not called upon to argue for the respondent.

CLEASBY, B. We do not think it necessary to hear any argument for the respondent. In the view taken by the magistrate the complaint has been fully heard. As it was not proposed to controvert the facts stated in the 3rd paragraph, I think that the magistrate could lawfully find the obstruction to be proved and reject the evidence of the appellant's witnesses as irrelevant; it might well be that the evidence would produce no effect upon his mind, for it really consisted of little more than statements of opinions. Whilst the facts in the 3rd paragraph remained undisputed, he was entitled to say that no evidence to be adduced by the appellant would alter his view that an obstruction existed.

GROVE, J. I am of the same opinion. If there had been

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any doubt whether the show-board did project into the street and the magistrate had refused to hear evidence as to this point, the case would have assumed a very different aspect; but whilst the facts in the 3rd paragraph were not in controversy, I am at a loss to see how the magistrate could have come to any other conclusion.

FIELD, J., concurred.

Judgment for the respondent.

Solicitor for appellant: *W. H. Orchard.*
Solicitors for respondent: *Miles & Lockyer.*

April 29.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

CODD, APPELLANT; CABE, RESPONDENT.

Arrest—Warrant—Offence less than Felony.

When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.

The appellant was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his apprehension. The respondent, being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him:—

Held, that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty.

CASE stated by justices of the peace for Devonshire under 20 & 21 Vict. c. 43.

At a petty sessions, holden at Totness, on the 20th of December, 1875, an information was heard, charging that the appellant, on the 16th of October, 1875, unlawfully did assault the respondent, he then being one of the constables for the county of Devon, duly appointed and in the due execution of his office and duty as such constable.

It was proved that the appellant was summoned to answer an information laid before a justice for Devonshire, and charging him with a trespass in the daytime in search of conies, and that he was

duly served with the summons, but that he failed to appear in obedience thereto; thereupon a warrant, on the 6th of April, 1874, was issued for his apprehension and placed in the hands of one of the Devon county constables. The appellant was a miner, and then resided in the parish of Stoke Gabriel, which adjoined the parish of Berry Pomeroy, where the offence of trespassing in search of conies had been committed. The warrant to apprehend was addressed: "To the constables of the parish of Stoke Gabriel, in the county of Devon, and to all other peace officers in the said county." In accordance with the usual regulation, when a warrant was issued by a magistrate for the apprehension of a person, the constables throughout the county were informed through the chief constable that a warrant was in existence for the apprehension of the appellant.

The appellant was not met with by the police until the 16th of October, 1875, when the respondent in uniform met the appellant in the parish of East Portlemouth, in the county of Devon, and said to him: "Is your name William Codd?" The appellant answered "Yes." The respondent then said: "I apprehend you under a warrant for not appearing at a Totness petty sessions to answer a summons, and you must go with me." The appellant said in reply: "Not to-day." There was no evidence that the appellant made any demand to see the warrant, but the warrant at that time was not in the personal possession of the respondent. The respondent then endeavoured to apprehend the appellant, who used great violence in resisting the attempted arrest, and inflicted serious injuries upon the respondent. For the time the appellant effected his escape, but he afterwards surrendered himself into the custody of the police.

The solicitor for the appellant took the objection that the attempted arrest was illegal, because the warrant of the 6th of April, 1874, was not in the possession of the respondent when he attempted to arrest the appellant, and therefore he was not at that time acting in the execution of his duty as constable.

The justices convicted the appellant, and adjudged him to be imprisoned in the Devon county gaol, and there to be kept to hard labour for six months. (1)

(1) Under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 12.

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The question for the opinion of this Court was, whether the warrant of the 6th of April, 1874, having been issued by a justice of the peace for the county of Devon for the apprehension of the appellant for disobeying a summons, and being in the hands of the Devon county constabulary, the respondent, as one of the officers of the same force, being then on duty in uniform, but not having the warrant in his own personal possession at the time of the attempted arrest, was legally justified in attempting to arrest the appellant.

April 28. *W. M. St. Aubyn*, for the appellant. The conviction for the assault upon the respondent cannot be upheld; the facts of this case cannot be distinguished in principle from those in *Galliard* v. *Laxton*. (1) The offence for which the summons had been issued had been committed long before the respondent endeavoured to take the appellant into custody; therefore the attempted arrest was illegal: *Reg.* v. *Marsden*. (2)

[BRAMWELL, B. That case turned upon the circumstance, that the original offence having ceased there was no fresh pursuit; it has no bearing upon the present facts.]

The appellant had not been guilty of felony; the offence in respect of which he had been summoned was punishable summarily; and as he had been duly served with the summons, he might have been convicted in his absence, when he failed to appear in obedience thereto (3); this shews that he ought not to be treated as a criminal, and that the respondent ought not to have attempted to arrest him without having the warrant in his possession.

M. W. McKellar, for the respondent. In *Galliard* v. *Laxton* (1) the warrant to arrest was issued for the non-payment of money under a bastardy order; it was in the nature of civil process, and very much resembled a writ of capias ad satisfaciendum; therefore the officer was bound to have it with him when he attempted to arrest the person named in it. The distinction is between civil and criminal process; if the arrest be for a crime, it is not necessary that the constable should have the warrant in his posses-

(1) 2 B. & S. 363; 31 L. J. (M.C.) 123.

(2) Law Rep. 1 C. C. R. 131.

(3) Under 11 & 12 Vict. c. 43, s. 2.

sion; and a game trespass is clearly a criminal offence: *Cattell* v. *Ireson*. (1) It is only requisite that the warrant should be properly directed. In *Reg.* v. *Sanders* (2) Kelly, C.B., said: "If the warrant had been specially directed to the police constable, or generally to all other constables and peace officers of the division, the arrest would have been lawful." Here the warrant was without doubt properly directed.

[BRAMWELL, B. *Reg.* v. *Sanders* (2) does not assist the contention for the respondent; for in that case the constable had the warrant in his possession at the time of the assault; the remark of the Lord Chief Baron must be understood to have been uttered with reference to the facts proved at the trial.]

It is submitted that as the appellant was well aware of the reason why the respondent wished to arrest him, there was no necessity to give further intimation thereof by producing the warrant: in 1 East P. C. 319, it is said: "It was ruled in *Mackalley's Case* (3), that if the party know the officer and his business, it is not necessary to give express notice thereof."

[DENMAN, J. In *Reg.* v. *Chapman* (4), Hannen, J., followed the authority of *Galliard* v. *Laxton*. (5)]

W. M. St. Aubyn, did not reply.

Cur. adv. vult.

April 29. The following judgments were delivered:—

BRAMWELL, B. The conviction was wrong, and must be quashed. The warrant to arrest the appellant had been issued in respect of an offence punishable upon summary conviction (6); and I think that *Galliard* v. *Laxton* (5) is in point to shew that, as regards the possession of the warrant by a police officer at the time of taking into custody, no difference exists between arrest upon civil process and arrest for crime other than felony. In the judgment delivered in the case which I have mentioned, the distinction is drawn between arrest for felony and arrest upon other grounds; and the reason is that a police officer can always arrest

(1) E. B. & E. 91. 4 Jur. N.S. 560
(2) Law Rep. 1 C. C. R. 75.
(3) 9 Rep. 69.
(4) 12 Cox, C. C. 4.
(5) 2 B. & S. 363; 31 L. J. (M.C.) 123; 8 Jur. N.S. 642
(6) Under 1 & 2 Wm. 4, c. 32, s. 30.

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and detain a person whom he reasonably suspects to have committed felony (1), but as a general rule, subject to certain exceptions mostly created by statute, he cannot arrest without warrant a person not charged with felony. I have always held it to be clear law that a person not charged with felony shall have the opportunity of seeing the warrant when he is taken into custody; and I should have arrived at the conclusion that the present appellant is entitled to judgment, even although there had been no authority in his favour. We have consulted some of the other judges, and they agree with us that the decision of the justices cannot be upheld. Although the appellant displayed great violence, yet it is not expressly found by the justices that he used more force than was necessary to prevent his apprehension, which was unlawful; and, therefore, as the case stands, he has not been guilty in law of even a common assault.

MELLOR, J. I quite agree with the view which has just been expressed by my Brother Bramwell. I think that *Galliard* v. *Laxton* (2) was well decided, and is an authority which we ought to follow. Whenever a warrant has been issued to arrest a person charged with an offence in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it; if he has not, the arrest will be illegal.

DENMAN, J. The general rule is, that in felony a police constable may arrest without a warrant, that in offences of a lesser degree he cannot: it follows, therefore, that when a warrant has been issued for an offence punishable upon summary conviction, the officer executing it ought to have it in his possession, ready to be produced if it is asked for. In *Galliard* v. *Laxton* (2) the distinction was drawn between arrests for felony and arrests for other matters; and it is plain from that case that arrests for offences less than felony stand upon the same footing as arrests upon civil process. The case which I have mentioned was followed by

(1) See *Beckwith* v. *Philby*, 6 B. & C. 635; as to what is reasonable suspicion, see *Hogg* v. *Ward*, 3 H. & N. 417.

(2) 2 B. & S. 363; 31 L. J. (M.C.) 123.

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Hannen, J., in *Reg.* v. *Chapman* (1), and I cannot doubt that it enunciates a correct principle. The respondent was not in the execution of his duty, and the information was not proved. The conviction must be quashed.

Judgment for the appellant.

Solicitors for appellant: *E. W. & R. C. Mote, for Carter & Son, Torquay.*

Solicitors for respondent: *Parkers, for Hooper & Michelmore, Newton Abbott.*

[IN THE COURT OF APPEAL.]

June 20.

GADD *v.* HOUGHTON AND ANOTHER.

Principal and Agent—Sale of Goods—Broker making Sold-note "on Account of" foreign Principal—Personal Liability of Broker.

Fruit brokers in Liverpool gave a fruit merchant the following sold-note:—"We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges, of the brand James Morand & Co., at 12*s.* 9*d.* per case free on board, ..." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:—

Held, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co." shewed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract.

Paice v. *Walker* (Law Rep. 5 Ex. 173) commented on.

THIS was an action for non-delivery of oranges sold by the defendants to the plaintiff. At the trial before Pollock, B., at the Liverpool spring assizes, 1875, the following facts were proved:—The plaintiff, a fruit merchant in Liverpool, having had some communication with the defendants, who were fruit brokers in Liverpool, as to the purchase of oranges with the brand of James Morand & Co., wrote to the defendants on the 4th of November, 1874, as follows:—"Please telegraph out an order on my account for 2000 cases Valencia oranges (all 420s) of the brand James Morand & Co. Shipment from commencement of season to not later than the 7th of December next, at 12*s.* 9*d.* per case, f. o. b." The

(1) 12 Cox, C. C. 4.

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defendants accordingly telegraphed to James Morand & Co. at Valencia, in Spain, that they had this offer, and having on the 7th of November received a reply by telegram from Morand & Co. that they accepted the offer, the defendants, on the 9th of November, wrote to the plaintiff as follows:—"Mr. George Gadd. We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges (all 420s) of the brand 'James Morand & Co.' at 12*s.* 9*d.* per case, free on board. Shipment from commencement of season, to not later than 7th of December next. Payment as usual. J. C. Houghton & Co." The contract not having been performed, the plaintiff brought this action. The defendants' counsel contended that upon this contract Morand & Co., and not the defendants, were liable, and they called several brokers and other witnesses, who gave evidence of usage in Liverpool as to the non-liability of brokers upon contracts in the present form, but the evidence became immaterial in the view taken of the contract by the Court of Appeal. A verdict was then entered for the defendants, with leave to the plaintiff to move to enter it for him, on the ground that the defendants were personally liable on the contract, the damages, if necessary, to be settled by a referee.

An order nisi having been obtained accordingly, was, after argument on the 11th of January, 1876, made absolute by the Exchequer Division (Kelly, C.B., Pollock and Huddleston, BB.), on the ground that the case was undistinguishable from *Paice* v. *Walker*. (1)

From this decision the defendants appealed.

Benjamin, Q.C., and *Bigham*, for the appellants, referred to *Cropper* v. *Cook* (2), *Paice* v. *Walker* (1), and to *Southwell* v. *Bowditch*. (3) [The arguments as to the admissibility and effect of the evidence of usage are omitted as immaterial, the Court of Appeal holding that the defendants were not liable, without reference to that usage.]

Herschell, Q.C., and *M'Connell*, for the plaintiff. The defendants having signed the contract in their own name without qualifi-

(1) Law Rep. 5 Ex. 173.
(2) Law Rep. 3 C. P. 194.
(3) 1 C. P. D. 100, and on appeal, 374.

cation are primâ facie liable personally: see the note to *Thomson* v. *Davenport*. (1) It is not sufficient for an agent to state that he is agent: per Lord Campbell in *Parker* v. *Winlow* (2); the intention to bind the principal and not the agent should clearly appear from the agent's signature, as in *Deslandes* v. *Gregory*. (3) When, as here, the principal is a foreigner, residing abroad, the presumption is, to say the least, stronger that it is intended to make the agent responsible: *Lennard* v. *Robinson* (4), and Story on Agency, 7th ed., ss. 268, 290, 400.

JAMES, L.J. I think the judgment of the Exchequer Division ought to be reversed. The case is not, in my opinion, in any way governed by *Paice* v. *Walker* (5), for whatever the decision was in that case upon the words "as agents," the words in the present case, "on account of," are not at all ambiguous, and it would be impossible to make them words of description. The ratio decidendi in *Paice* v. *Walker* (5) was that, having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain "on account of" another person. Those are the very words used in the present case. When a man says that he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms the English language affords to shew that he is not binding himself, but is binding his principal. As to *Paice* v. *Walker* (5), I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to exclude that idea. If that case were now before us, I should hold that the words "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description,

(1) 2 Sm. L. C. 6th ed. 344.
(2) 7 E. & B. at p. 947; 27 L. J. (Q.B.) at p. 52.
(3) 2 E. & E. 602; 29 L. J. (Q.B.) 93.
(4) 5 E. & B. 125; 24 L. J. (Q.B.) 275.
(5) Law Rep. 5 Ex. 173.

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but I do not think the words "as agents" were words of description.

MELLISH, L.J. I am of the same opinion. The question is whether, on the true construction of this contract, Houghton & Co. sold the goods themselves or entered into a contract on behalf of Morand & Co. The language used must be interpreted according to its plain and natural meaning. As is said in the note to *Thomson* v. *Davenport* (1), when a man signs a contract in his own name he is primâ facie a contracting party and liable, and there must be something very strong on the face of the instrument to shew that the liability does not attach to him. But if there are plain words to shew that he is contracting on behalf of somebody else, why are we not to give effect to them? I can see no difference between a man writing "I, A. B., as agent for C. D., have sold to you," and signing "A. B.;" and his writing, "I have sold to you" and signing "A. B. for C. D. the seller." When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable. This is one of the simplest possible cases. How can the words "on account of Morand & Co." be inserted merely as a description? The words mean that Morand & Co. are the people who have sold. It follows that the persons who have signed are merely the brokers and are not liable. I agree also that the circumstances of *Paice* v. *Walker* (2) are to be distinguished from the present, and that the judgment of the Exchequer Division ought to be reversed.

BAGGALLAY, J.A., concurred.

QUAIN, J. The case appears to me plain. It seems extraordinary that there should be any doubt whether this binds the principal or the agent. It is said that in order to relieve the agent from liability, he must sign "as agent" or "on account of" Morand & Co. I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand & Co. Those words at the end of the

(1) 2 Sm. L. C. 6th ed. 344. (2) Law Rep. 5 Ex. 173.

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signature would add nothing to what has been stated in the body of the contract. The agent, therefore, does not render himself personally liable by not adding them.

ARCHIBALD, J. I am of the same opinion. The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent. That, however, is not the only way, because, if it is clear from the body of the contract that he contracted only as agent, he would save his liability. No words could be plainer than the words "on account of Morand & Co." to shew that the defendants contracted only as agents.

I also agree that *Paice* v. *Walker* (1) is to be distinguished from this case.

Judgment reversed and rule discharged.

Solicitors for plaintiff: *Johnson & Weatherall, for Snowball, Copeman, & Smith, Liverpool.*

Solicitor for defendants: *E. Byrne, for Whitley & Maddock, Liverpool.*

PRESTON AND OTHERS *v.* LAMONT.

May 26.

Practice—Service of Writ out of Jurisdiction—Pleading to Jurisdiction—Rules of Court, 1875, *Order II., Rules* 4, 5; *Order XI., Rules* 1, 3.

The question whether the subject-matter of an action is such that service of a writ out of the jurisdiction ought to be allowed under the Rules of Court, 1875, Order XI., is a question for the decision of a judge at chambers, subject to appeal, and the defendant cannot raise it by statement of defence.

THIS was an application to strike out the statement of defence as wholly bad.

In the statement of claim the plaintiff sought to recover the price of goods sold and delivered.

The statement of defence contained the following allegations:—The action was commenced on the 18th of January, 1876, by a writ in the form given by the Rules of Court, 1875, Appendix A., Part 1, Form 2, under colour of Order II., Rules 4, 5, and served on the defendant at Glasgow, in Scotland. The action is brought to enforce, or for the breach of, contracts made at Glasgow,

(1) Law Rep. 5 Ex. 173.

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and wholly out of the jurisdiction of this Court. There never was any breach within the jurisdiction. None of the circumstances mentioned in Order II., Rule 1, exist. The defendant was born in Scotland, a subject of the Queen, of parents who were also such subjects, and was, long before and at the time of the issue of the writ and has thenceforth been, resident and domiciled in Scotland alone, and has not been during the same period resident or domiciled in England or within the jurisdiction. The defendant is entitled to all the privileges and immunities secured to Scottish subjects of the Queen by statutes uniting the kingdoms of England and Scotland. Even if any of the circumstances mentioned in Order II., Rule 1, existed, the subject-matters of the action are alleged debts or breaches of contracts by non-payment of money, over which, when the Judicature Act, 1873, was passed, no Court of Equity had jurisdiction, but which were wholly within the exclusive jurisdiction of the Courts of common law. No Court, the jurisdiction whereof is transferred to or vested in this or any Court by the Judicature Acts, 1873 or 1875, nor any other Court save Courts established in Scotland, had, up to the passing of the Judicature Act, 1873, any jurisdiction or cognizance over such subject-matters as those in this action exerciseable by process in Scotland, or having any validity in Scotland, or as regards persons living in Scotland. No jurisdiction capable of being so exercised was transferred to or vested in this Court by s. 22 of the Judicature Act, 1873. Several of the Courts of Justice in Scotland, and in particular the Court of Session at Edinburgh, have complete jurisdiction over all the subject-matters of this action and the defendant, and can do complete justice herein.

It appeared that the plaintiff had, under Rules of Court, 1875, Order II., Rules 4, 5, and Order XI., Rule 1, by leave of a judge, issued the writ and served it on the defendant in Glasgow. The defendant appeared to the writ and some time afterwards applied to set aside the writ and service on the ground that the case did not come within Order XI., Rule 1. The judge at chambers refused to make any order, on the ground that the defendant had appeared and the application was too late. On the 29th of May this decision was affirmed on appeal by the Exchequer Division (Kelly, C.B., Cleasby, B.) on the same ground, and also on

the ground that there was a breach of contract within the jurisdiction so as to bring the case within Order XI., Rule 1.

Cyril Dodd, for the plaintiff, in support of the application to strike out the statement of defence, referred to 4 Anne, c. 16, s. 11; to the Rules of Court, 1875, Order XIX., Rule 13, abolishing pleas and defences in abatement; and to *Ex parte Robertson* (1) and *Drummond* v. *Drummond*. (2)

C. Crompton, for the defendant. This is a plea to the jurisdiction. The question of jurisdiction is one of fact which ought to be tried by a jury and not by a summary decision at chambers upon affidavits. Suppose the subject-matter of this action were land upon the Scotch border and the defendant desired to raise the question whether the land was on the English side, so as to bring the case within Order XI., Rule 1; it cannot have been intended by the Rules of Court, 1875, that that question of fact should be determined summarily by a judge or master at chambers.

BRAMWELL, B. If the defence were plausibly good it ought to be allowed, but it is manifestly bad. It is not really a plea to the jurisdiction, it is a plea to the propriety of the service of the writ. The plaintiff has not a right at his own choice to issue a writ for service out of the jurisdiction, but upon a judge being satisfied leave is given. The judge may be wrong in giving leave, and if so the defendant may apply to get it set aside; but if it is not set aside the order for service must stand. Under the orders and rules an application is made to a judge for leave to issue a writ and serve it out of the jurisdiction, and thereupon service may be allowed. The decision of the judge in cases of this description upon proper affidavits and subject to be reviewed on appeal is the only decision on the question of service, and when it is decided that the service is not to be set aside it must stand, and the defendant must defend on the merits. A defendant may say in his defence he never made the contract, or that he never broke it, but not what he says here. This application to set aside the statement of defence must therefore be granted.

AMPHLETT, B. I am of the same opinion. This is a plea to

(1) Law Rep. 20 Eq. 733. (2) Law Rep. 2 Ch. 32.

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the service of the writ, not to the jurisdiction. A judge ought not to make an order for service out of the jurisdiction unless he is satisfied that the action comes within the instances given in Order XI., Rule 1. The decision of the judge at chambers can be contested on appeal, and if necessary in the House of Lords. There is convenience in this, because it is a speedy and inexpensive mode of determining that question before any expense is incurred upon the merits of the action. Whereas if the question may be raised by plea, all the expenses of the action may be thrown away if it is eventually determined that the case is not within Order XI., Rule 1. Convenience and justice, I think, require that this question should not be the subject of a plea.

Application granted.

Solicitor for plaintiffs: *Albert West.*

Solicitor for defendant: *C. Butcher, for Gavin Hamilton, Glasgow, Writer.*

May 22.

PICKARD *v.* MARRIAGE.

Bill of Sale—Possession or apparent Possession of Goods by Grantor as Servant to Grantee—Description of every attesting Witness—Affidavit defective— 17 & 18 *Vict. c.* 36, *ss.* 1, 5.

18 Ch D 38
10 Q B D 92,
94

The execution by the grantor of a bill of sale which was not made under process and which required registration was attested by two witnesses, and contained a description of the residence and occupation of each witness. The affidavit filed with the bill contained a description of the residence and occupation of only one of the attesting witnesses:—

Held, that the affidavit was not sufficient to satisfy 17 & 18 Vict. c. 36, s. 1, since it did not contain a description of the residence and occupation of "every attesting witness."

The grantor of a bill of sale of household furniture managed a business as servant to the grantee at a weekly salary, and was allowed to reside in the house where the business was carried on and to use the furniture as part of his salary, the grantee residing elsewhere. The goods having been taken in an execution against the grantor and the bill not having been duly registered:—

Held, that the goods were in the possession of the grantor within the meaning of 17 & 18 Vict. c. 36, ss. 1, 5, and that the execution creditor was entitled to them as against the grantee.

INTERPLEADER ISSUE, in which the plaintiff affirmed, and the defendant denied, that certain goods and chattels on the 11th of

February, 1875, seized that day by the sheriff of Surrey, under a fi. fa. issued upon a judgment recovered by the defendant against Henry Pickard, were the property of Edwin Pickard, the plaintiff. At the trial at the Surrey spring assizes, 1875, before Joyce, Q.C., commissioner, the following facts were proved:—

In October, 1874, the plaintiff Edwin Pickard, a dairyman and cab-owner, bought a dairy business at Stockwell Green for his brother Henry, the debtor, who thereupon brought up from a farm which he had previously rented, his family and household furniture to the house at Stockwell Green, and began to reside there and carry on the dairy business. The debtor being unable to pay the purchase-money, the plaintiff completed the purchase on his own account, and paid the debtor 25*s.* a week as his manager. On the 3rd of December the debtor, in consideration of past advances and a present loan, gave the plaintiff a bill of sale of all the furniture and goods on the premises at Stockwell Green. It was provided by the bill that so long as the plaintiff should think fit the debtor should "have the use and apparent possession of the household furniture, goods, &c." The bill also recited that the debtor had put the plaintiff "in full possession by delivering to him one chair in the name of all the household furniture, goods, &c." The chair, however, remained with the rest of the furniture on the premises, where the debtor continued to reside and appeared to be the owner of the business until the sheriff seized, the plaintiff residing elsewhere. There was some evidence to the effect that the plaintiff and the debtor had agreed that the debtor should have the use of the house and furniture as part of his wages as the plaintiff's manager. The debtor's execution of the bill was attested by two witnesses, one being "J. J. Jackson, 51, Thornton Street, Brixton, S.W., clerk;" and the other, "William Jackson, 51, Thornton Street, Brixton, Surrey, house and business agent." The bill was registered on the 4th of December, and with it was filed an affidavit by "William Jackson, of No. 51, Thornton Street, Brixton Road, in the county of Surrey, house and business agent," verifying the bill, but containing no reference whatever to the other attesting witness, J. J. Jackson.

The defendant's counsel contended that the goods were at the time of the seizure by the sheriff in the possession, or apparent

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possession, of the debtor within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36, and that the bill therefore required registration, and that the affidavit was defective. The jury found that the bill of sale was given bonâ fide for advances of money by the plaintiff to the debtor, and a verdict was entered for the plaintiff. An order nisi was afterwards obtained to enter the verdict for the defendant, pursuant to leave reserved, on the ground that the affidavit filed by the plaintiff in pursuance of 17 & 18 Vict. c. 36, was defective in not containing a description of the residence and occupation of both the attesting witnesses to the bill of sale under which the plaintiff claimed.

1875. Nov. 4. *Edmund Thomas*, for the plaintiff, shewed cause. The order ought to be discharged on two grounds; first, that the bill of sale did not require registration, and, secondly, that it was duly registered. First, it did not require registration because the goods were not "in the possession or apparent possession" of the grantor within the meaning of 17 & 18 Vict. c. 36. They were in the possession of the grantee by his servant, the grantor, who received a weekly salary, calculated on the basis that the servant enjoyed the use of the furniture. It was the same as if the debtor had paid rent for the furniture, and the rent had been deducted from his salary. Secondly, the affidavit was sufficient, as it contained a description of the residence and occupation of one of the attesting witnesses. The words of 17 & 18 Vict. c. 36, s. 1, "and of every attesting witness to such bill of sale," refer only to bills of sale "given by any person under or in execution of any process;" or if they apply to every bill of sale, then they are meant to meet the case where more than one grantor executes, and before different witnesses. Here the bill of sale gave the residence and occupation of both witnesses, and in *Routh* v. *Roublot* (1) Lord Campbell said: "I lay down no rule but this, that the affidavit required by the statute must give such information as reasonable persons would require." When there is an insufficient description of the grantor in the affidavit, the bill of sale may be referred to to supplement the affidavit: *Jones* v. *Harris*. (2)

(1) 1 E. & E. 850, 852; 28 L. J. (Q.B.) 240.
(2) Law Rep. 7 Q. B. 157.

(1 E & E mon Roublot v Routh 5 Jur N S. 648

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W. Willis, for the defendant, in support of the order. First, the debtor had the same use of the furniture before as after the execution of the bill of sale. The house was "occupied" by him, and the goods were "used and enjoyed by him," and he was therefore in possession of them within the Act. Secondly, the clause "and of every attesting witness to such bill of sale" is not confined to bills given under process: *Nicholson* v. *Cooper*. (1)

[CLEASBY, B., referred to *Tutton* v. *Sanoner* (2) and 1 Ch. Arch. Pr., p. 670 (12th ed.), and the cases there cited.]

KELLY, C.B. We think that the affidavit must contain a description of the residence and occupation of every attesting witness, and that it was therefore insufficient. On the other point, we will consider our judgment.

Cur. adv. vult.

May 22. The judgment of the Court (Kelly, C.B., Bramwell and Cleasby, BB.), was delivered by

BRAMWELL, B. We think the order must be made absolute. The first question was whether the affidavit was sufficient, the description of one of the attesting witnesses being omitted from the affidavit, and we are all of opinion, as was intimated during the argument, that, upon the decided authorities, the affidavit was not sufficient. But the principal question which arose was this: the plaintiff contended that the grantor was not in possession of the goods at the time of the seizure. We think he was in possession, the furniture being in the room occupied by the grantor as servant to the grantee, he using the room and having the benefit of the furniture as part of his wages. It was said that he was in possession only as servant, and therefore the case was not within the Bills of Sale Act. But we think it is within the very mischief the Act was intended to prevent. If, instead of 25*s.* a week wages and the use of the furniture free, he had had 30*s.* a week and had paid rent for the furniture, it is manifest he would have been in possession. If we acceded to the plaintiff's argument, we should hold that the grantor of a bill of sale might contend that he had given up possession because he paid rent to the grantee, and that

(1) 27 L. J. (Ex.) 393.

(2) 3 H. & N. 280; 27 L. J. (Ex.) 293.

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registration was not required. This would bring about the very mischief the Act was intended to prevent. The rule must therefore be absolute to enter the verdict for the defendant, the bill not having been duly registered, because of the defect in the affidavit.

Order absolute.

Solicitor for plaintiff: *Edward Crammond.*
Solicitor for defendant: *O. March.*

May 5.

BOBBETT *v.* PINKETT.

Banker and Customer—Payment of crossed Cheque to wrong Bankers—Forged Indorsement—Ratification by Customer of Banker's unauthorized Payment —Money had and received.

The plaintiff drew a cheque on his bankers, M. & Co., payable to order, crossed it "L. & C. Bank," and sent it for value to the payee, from whom it was stolen and his indorsement forged. It was ultimately passed to the defendant, who took it bonâ fide in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the L. and J. Bank presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing "L. & C. Bank." On hearing it was paid the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second cheque for the same amount, which also was paid by M. & Co., and the plaintiff's account was debited with both cheques. The plaintiff having brought an action for the amount of the first cheque, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first cheque:—

Held, that the first cheque had been paid by M. & Co. improperly and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant who had acquired no title to the cheque.

ACTION for 47*l.* 16*s.* 11*d.*, for money had and received and money due on accounts stated. Plea, never indebted, and issue thereon.

At the trial before Bramwell, B., in Middlesex, on the 21st of April, 1875, the following facts appeared:—On the 14th of December, 1874, the plaintiff, a corn merchant at Tunbridge Wells, drew a cheque for 47*l.* 16*s.* 11*d.* on his Tunbridge Wells bankers, Molineux & Co., payable to the order of one Pennack, crossed the

cheque "London & County Bank," and sent it by post to Pennack, his creditor, at Birmingham, who left it lying about. Some one stole it, and forged Pennack's indorsement. A few days after, the cheque purporting to be indorsed by Pennack, was handed to the defendant, the proprietor of an hotel in Worcester, by a customer, who asked the defendant to pay him the balance after deducting the amount of his hotel bill. The defendant, through his bankers, telegraphed to Molineux & Co., to know if the cheque was all right and would be paid. Molineux & Co. replied by telegram that the cheque was good, and would be paid unless they had orders not to pay it. The defendant then, acting bonâ fide and in ignorance of the forgery and the theft, took the cheque from his customer, and gave it to his own bankers, "The Worcester City and County Banking Co." for presentation. In the meantime, Pennack had, about the 15th of December, sent a letter and a telegram to the plaintiff informing him of the loss of the cheque; but the plaintiff swore that he did not receive either letter or telegram, and did not know of the loss till late on the 29th of December, when he admitted he received a letter from Pennack mentioning the loss, requesting another cheque, and offering an indemnity in respect of the first cheque. The plaintiff accordingly, on the 29th, sent Pennack another cheque for the same amount. On the 30th of December, about 11 a.m., the first cheque was presented to Molineux & Co. by the London and Joint Stock Bank as agents of the Worcester City and County Banking Co. Molineux & Co. (not observing or disregarding the name of the London and County Bank, which their manager said was nearly illegible) paid the cheque in the usual way to the London and Joint Stock Bank and debited the plaintiff's account with it. (1) On the 1st of January, 1875, the second cheque was presented to Molineux & Co., paid, and debited by them to the plaintiff's account. The plaintiff admitted that he lived within a few minutes' walk from Molineux & Co.'s bank, but that he did not take any steps towards stopping the first cheque or communicating with them till the 4th of January, when he discovered that his

(1) The cheque when produced in Court bore the stamp of the London and Joint Stock Bank across it, but there was no evidence as to whether it was stamped before or after presentation to Molineux & Co.

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account had been debited with both cheques. On the 1st of January, the defendant, hearing that the first cheque had been paid, sent his customer the balance after deducting the amount of the hotel bill.

Bramwell, B., directed the jury to consider whether Pennack, the plaintiff, Molineux & Co., and the defendant, or any of them, were guilty of negligence, viz. Pennack in losing the cheque and in not taking further steps to stop it when he received no answer to his letter and telegram of the 15th of December; the plaintiff, in not stopping the first cheque on the evening of the 29th, or morning of the 30th, of December; Molineux & Co., in disregarding the name of the London and County Bank, which was in their own customer's handwriting; and the defendant in giving value for the cheque in the way he did. The jury found that all the above persons, except the defendant, were guilty of negligence. Bramwell, B., then directed a verdict for the defendant, giving leave to the plaintiff to move to enter it for him for 47*l.* 16*s.* 11*d.*, neither party to appeal from the Court of Exchequer. An order nisi was accordingly obtained, on the ground that upon the facts proved at the trial, together with the findings of the jury, the plaintiff was entitled to a verdict.

Jan. 11, Feb. 14, 1876. *Powell, Q.C.*, and *Jelf*, for the defendant, shewed cause. The action for money had and received depends upon privity of contract, but the money received by the defendant was not the property of the plaintiff, but of Molineux & Co., and paid by them in their own wrong. The effect of 19 & 20 Vict. c. 25, s. 1, and 21 & 22 Vict. c. 79, ss. 1, 4, is that payment of a crossed cheque to the wrong banker is a void payment: Byles on Bills, 11th ed., p. 23. The plaintiff could undoubtedly treat it as such, and require his bankers to credit him with the amount, and he cannot treat it as a good payment, at least not so as to affect the defendant injuriously. The plaintiff is in this dilemma,—if the payment was bad, he must look to his bankers for indemnity; if it was good, he cannot recover it from the defendant. He cannot say it was both good and bad, or that his bankers were his agents and at the same time not his agents to pay. By not objecting to being debited with the amount, he has

admitted the payment to be good, and is estopped from saying it is bad. The action for money had and received lies only when it is inequitable that the defendant should retain the money, but the defendant has done nothing wrong, and is the only person in the transaction not guilty of negligence. He took more than ordinary care. The plaintiff is injured not by the defendant's act, but by the laches of his bankers, and his own laches in not stopping the cheque the moment he heard of its loss, which he had ample time and means of doing. *Ogden* v. *Benas* (1) is no authority against the defendant, for there the plaintiff had committed no laches, and moreover could not sue his bankers, who were protected by 16 & 17 Vict. c. 59, s. 19, from the consequence of paying on a forged indorsement. But no statute protects bankers against payment of a crossed cheque to the wrong banker. The plaintiff, having a right against his own bankers to treat the payment as void, with full knowledge of the facts treats it as a good payment and does not put himself in the position of the plaintiff in *Wilkinson* v. *Johnson*. (2) There being no privity between the plaintiff and defendant, the case is concluded by *Rogers* v. *Kelly* (3), per Lord Ellenborough. If the defendant is liable to any one, it is to Molineux & Co. *Smith* v. *Union Bank* (4), if it touches the present case at all, is an argument to shew that the payment to the wrong bankers is a good payment, and cannot be upset.

W. Willis for the plaintiff. *Ogden* v. *Benas* (1) would be conclusive in the plaintiff's favour but for the distinction that there the cheque was not specially crossed, and was not paid to the wrong banker. This difference is unfavourable to the defendant; he ought not to have taken a specially crossed cheque at all; having obtained payment through the wrong banker, he cannot profit by his own wrongful act, or by the wrongful act of Molineux & Co. done at the defendant's request. *Rogers* v. *Kelly* (3) is irrelevant; there the banker was not the plaintiff's agent. The general principle is clear, that when a banker pays a cheque on a forged indorsement he can recover the money on the ground that the consideration failed, or that the instrument is not genuine, or that it was paid under a mistake of fact—Byles on Bills, p. 334, 11th ed.,

(1) Law Rep. 9 C. P. 513.
(2) 3 B. & C. 428.
(3) 2 Campb. 123.
(4) 1 Q. B. D. 31.

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citing *Jones* v. *Ryde* (1), and other cases. See also *Cocks* v. *Masterman* (2) and *Smith* v. *Mercer* (3) to the same effect. Then if the banker, who is the customer's agent, can recover it, the customer can. The payment by Molineux & Co. was at first wholly unauthorized (21 & 22 Vict. c. 79, s. 1); but the principal may ratify an unauthorized act, and take the benefit of it, e.g., in the case of a distress for rent. The statutory restriction on crossed cheques was imposed for the benefit of the customer, who may waive the benefit if he likes. It is conceded that the plaintiff had a reasonable time and opportunity to stop the cheque being paid, but he was under no obligation to do so as regards the defendant, about whom he knew nothing. He is not in the position of the plaintiff in *Young* v. *Grote* (4), or of those who actually do something which induces another to act to his own loss, and are estopped. Negligence to operate as an estoppel must be the proximate cause of the loss: *Swan* v. *North British Australasian Co.* (5)

Cur. adv. vult.

May 5. The following judgments were read:—

BRAMWELL, B. It is quite certain that if the payee had brought an action against the present defendant for the conversion of the cheque in question, he could have maintained it. It is also certain that the present plaintiff might have refused to allow the bankers, Molineux & Co., to debit his account with the amount of the cheque, and had he done so, and had Molineux & Co. brought an action against the defendant to recover back the money they had paid him, they could have maintained that action. But, for some unintelligible reason, it has been thought right to bring the present action in the plaintiff's name, and so create a difficulty of party and procedure rather than of right. It is certain, however, that the defendant is liable in some way to some one, the question being whether he is liable in this action to this plaintiff.

When a banker pays a cheque, the customer may treat it as a payment made by himself, so as to recover the money back in certain cases, as for example when there is a failure of considera-

(1) 5 Taunt. 488.
(2) 9 B. & C. 902.
(3) 6 Taunt. 76.
(4) 4 Bing. 253.
(5) 7 H. & N. 603; 31 L. J. (Ex.) 425.

10 L. 102 8 Jur. N.S. 940.

tion between the drawer and payee of the cheque. But the difficulty suggested in this case is that the plaintiff cannot say that the payment was by his authority, so as to make it a payment by him, and yet that it was not with his authority, so as to enable him to recover it back—that he cannot approbate and reprobate. We think, however, that notwithstanding this objection, the plaintiff is entitled to recover.

There were two defects or difficulties in the defendant's title to the cheque and power to enforce payment of it. One, that the endorsement was forged. That was a defect in his title. Had this been all, it is clear that the bankers paying it would have been entitled to debit the plaintiff's account with it, and that he the plaintiff would have been entitled to get the money back from the defendant, treating its payment as with his authority, and therefore by him.

The other difficulty in the defendant's way was, that the cheque had across it the name of the London and County Bank, so that the defendant could only effectually present it through that bank. And if, as was the case, it was presented through another, the drawees might have refused to pay it, and if they did pay, the plaintiff might have refused to recognize that payment. But this is a matter between him and the defendant and the drawees, three persons; and the plaintiff may, if he thinks fit, say, "I was and am content that, if you were entitled to the cheque, it should have been presented by and paid to a person other than the banker whose name was crossed, and was and am content that I should be charged with it, if there was no defect in your title to it. But I say that, having discovered that you the defendant have no title to the cheque, and that a fourth person has, whose rights I cannot affect, I claim the money back from you on that ground." This is in effect what the plaintiff says. It is not to approbate and reprobate the same matter. The plaintiff approbates the mode of presentment, but reprobates the defendant's title.

Another way of putting the case is this. The defendant cannot be heard to say that the cheque was improperly presented, for he presented it by his agents. Then the only other matter is one against him, viz. that he was not the lawful holder of the cheque. The truth is, it would be somewhat hard on the plaintiff if he

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could not recover. He has allowed his account to be debited with this cheque, and could not now object to it. The bankers, the drawees, could now maintain no action against the defendant. The payee, indeed, could, but that would be no indemnity to the plaintiff. On the other hand, this decision is no hardship to the defendant, who is clearly liable to some one; except, indeed, that it is very hard on him that he should be liable at all, being the only one of the various parties free from blame.

My Brother Cleasby agrees with this judgment, and also with that of my Brother Amphlett.

AMPHLETT, B. It is clear that the defendant, although the innocent holder for value of the cheque with a forged indorsement of the payee's name, had no property in it, and was not entitled to recover the amount for which it was drawn. In ignorance, however, of the fraud, the cheque was presented for payment by London bankers on behalf of the defendant, and the drawees not observing or disregarding the fact that the bankers who presented it were not the same as those who were named in the crossing, and having sufficient assets of the plaintiff in their hands, paid the same and debited the amount in the plaintiff's account. The bankers by whom the cheque was presented afterwards accounted for the money they received to the defendant. Under these circumstances the defendant would be liable, beyond question, to be sued by somebody for the money thus wrongfully obtained; and leaving out of consideration for the moment the effect of the crossing, it may, I think, be considered as settled, both on principle and authority, that not only the drawees, but the plaintiff, whose money in fact it was, might maintain the action: see *Ogden* v. *Benas.* (1)

The question, however, remains, whether the payment by the drawees to bankers other than those named in the crossing makes any difference. It cannot be denied that the crossing operated as a mandate to the drawees to pay the cheque to the bankers named and to no one else, and that consequently the plaintiff might, if he was so minded, have declined to allow his account to be debited with the amount so paid contrary to his orders, and it was argued

(1) Law Rep. 9 C. P. 513.

before us that his voluntarily submitting as he did to have his account so debited could not enable him to maintain an action against the defendant in his own name. It is not likely that any advantage would accrue to the defendant by a decision of this point in his favour, because another action might be immediately commenced by the drawees, and the fact that they, as between themselves and the plaintiff, had been indemnified against loss would not, I apprehend, be an answer to the action. Still, as conceivably the defendant's position might be altered by allowing the plaintiff to sue instead of the drawees, he has a right to have our judgment upon the point. After some hesitation, I have come to the conclusion that the plaintiff may sue in his own name, notwithstanding he had an option, which he declined to exercise, of disavowing the payment of the cheque, and throwing the loss, if any, upon the drawees.

It may be conceded that in an ordinary case, as the law stood at the time of this transaction, a right of action could not be transferred to his principal by an agent acting beyond the scope of his authority; but here it must be observed that the drawees were at least professing to act as the plaintiff's agents in paying the cheque, and the defendant himself applied to them for payment in that character; and the defendant therefore cannot, in my judgment, be allowed to set up a want of authority in the drawees which the plaintiff himself has declined to insist upon. Suppose B., professing to act as A.'s agent, but in fact not authorized, enters into a contract with C. Would not A., by subsequently ratifying B.'s act, be entitled to sue C. on the contract in his own name? See the judgment of Holroyd, J., in *Saunderson* v. *Griffiths.* (1) Upon the whole I think our judgment ought to be for the plaintiff.

Order absolute to enter the verdict for the plaintiff for the amount of the cheque.

Solicitors for plaintiff: *Collyer-Bristow & Co., for Stone & Simpson, Tunbridge Wells.*

Solicitors for defendant: *Hunt & Son, for Rea & Miller, Worcester.*

(1) 5 B. & C. 915.

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June 15.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

WILLIS *v.* MACLACHLAN.

Revising Barrister, Jurisdiction of—Power to order Person to quit the Court—Interruption of Business of the Court—The County Voters Registration Act, 1865 (28 *Vict. c.* 36), *s.* 16.

By 28 Vict. c. 36, s. 16, "It shall be lawful for any revising barrister . . . . to order any person to be removed from his Court who shall interrupt the business of the Court, or refuse to obey his lawful orders in respect of the same." The defendant, a revising barrister, ordered the plaintiff to be removed from his Court, which he was then holding for the revision of the lists of voters for the county of D.; the ground of the order was that, in the previous year, whilst the defendant was sitting as revising barrister, the plaintiff had wrongfully withheld certain documents, and had thereby caused W., a claimant to be registered as voter, to be deprived of his vote. The plaintiff having sued in a county court for wrongful expulsion from the defendant's court, the latter, by way of special defence, relied upon the provisions of 28 Vict. c. 36, s. 16, and the judge nonsuited the plaintiff on the ground that the question of "interruption" having been decided by a revising barrister, his discretion could not be reviewed before another tribunal:—

Held, upon appeal to this Court, that the special defence was not proved and that the nonsuit was wrong.

THIS was an appeal under the County Courts Act, 1875, (38 & 39 Vict. c. 50), s. 6, against a decision of the county court of Durham, holden at Gateshead, in an action of trespass. The particulars were as follows: "The plaintiff sues the defendant, for that the defendant, on the 30th day of September, 1875, at the police court at Gateshead, during the sitting of a revising barrister's court there and held by the defendant for the revision of the lists of voters in the Whickham polling district, did beat, assault, and cause to be beaten and assaulted, the plaintiff, and the said plaintiff did unlawfully and without cause give into the custody of a police constable, and the said plaintiff did imprison and did remove, or cause to be removed, forcibly and unlawfully from the revising barrister's court, and from the place or room in which the said court was being held, when the plaintiff was not interrupting the business of the said court, and was not refusing and had not refused to obey the lawful orders of the defendant, as such revising barrister as aforesaid. And for that the defendant did

unlawfully and without cause give the plaintiff into the custody of a police constable, and did cause the plaintiff to be unlawfully, forcibly, and against his will removed from a certain place or room in which the plaintiff lawfully was, and did cause the plaintiff to be unlawfully and without cause imprisoned. And the plaintiff claims 5*l*." The defendant gave notice (1) of the following special defence: "The defendant at the time of the grievances complained of was a revising barrister, duly appointed to revise the lists of voters for the county of Durham in both divisions thereof, and also for the cities and boroughs in the said county, and was, as such revising barrister, holding open court in the police court at Gateshead, in the said county, for such revision of the lists of voters for the northern division of the said county, and in such court and as such revising barrister did adjudge the plaintiff to be a person then and there interrupting the business of the said court; and thereupon, under and by virtue of the 16th sectio of the County Voters Registration Act, 1865 (28 Vict. c. 36, s. 16), and within his jurisdiction and authority as such revising barrister, did order the plaintiff to be removed from his, the defendant's, court so being holden as aforesaid, and the said order was then and there lawfully carried into effect, which are the grievances in the plaint alleged."

At the trial in the county court upon the 16th of May, 1876, the solicitor for the plaintiff produced and put in a copy of the *Newcastle Daily Chronicle* for the 1st of October, 1875, as containing an account of what took place at the court held by the defendant at Gateshead as revising barrister on the 30th of September. The counsel for the defendant admitted that the report therein contained was substantially a fair account of what passed. The following are the material portions thereof, and the plaintiff was William Willis therein alluded to:—

"Revision Courts.

"Gateshead.—Scenes in Court.

"Mr. D. Maclachlan, revising barrister, attended yesterday at the Gateshead police court for the purpose of revising the list of voters in the Gateshead polling district for the northern division

(1) Under the County Court Rules, 1875, Order IX., Rules 7 and 14.

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of the county of Durham. Messrs. Storey and Bowey (Sunderland) appeared for the Liberals, and Messrs. Simey (Sunderland) and R. Allen (Durham) represented the Conservatives."

The report, after narrating the transaction by the defendant of various business connected with the revision of the lists of parliamentary voters, then proceeded to state, that the defendant heard the claim of Thomas Willis, a relative of the plaintiff, to be inserted upon the register of voters. In 1874 Thomas Willis had claimed to vote in respect of a freehold qualification, and upon the evidence then adduced it was held that the property in respect of which the claim was made was of copyhold tenure; the claim was therefore disallowed. In 1875 he claimed as a copyholder; but it then appeared that the property was really of freehold tenure, and the claim was again disallowed. In the opinion of the defendant, sitting as revising barrister, the plaintiff, who had been present at the Court of revision in 1874, had improperly withheld the production of documents which would have shewn the nature of the tenure of the property in respect of which Thomas Willis claimed. The report then proceeded as follows:—

Thomas Willis was examined upon oath, and after some discussion,

"Wm. Willis was called by the revising barrister, and examined as follows: 'You attended this Court last year?'—'Yes.' 'You were in the Court when this case of Thomas Willis was under discussion?'—'I believe I was; I am not sure.' 'Were you called as a witness?'—'No, sir.'

"The Revising Barrister: 'Have you anything further to say, Mr. Simey?'

"Mr. Simey: 'No.'

"The Revising Barrister then said: 'It seems to me that I cannot hold this vote is proven. I am obliged to hold that it is freehold on the evidence before me. It is unnecessary, therefore, to consider whether there is value in the case of copyhold. But it is a very hard thing, I must say, that this man, if I understand the relation between these persons—the two men who have lately been in the witness-box—standing in the relation of uncle and nephew'—[Mr. Simey: 'No, half-cousin.' Mr. Willis: 'His father was my cousin.']—'Well, this man has to-day produced documents

that have ousted Thomas of his vote, and these documents, he says, he has possessed for the last five years at least, and therefore he had them in his possession last year, and knew the truth as to the question that was before me, when I was sitting here as judge and deciding finally in the matter. That man, being the agent of one of the parties before me at that time, and being a partisan agent for the party that ousted Thomas of his vote, stood by—I will not charge the party with knowing it; it is not necessary to do so, or even to hint that they knew it; but they got information somehow—this man, I say, stood by with the knowledge in his breast and these documents in his pocket, and suffered his own relative to be ousted of his vote. I cannot but censure him before the public, and I do so with indignation. I order this man to be taken out of Court, if there is a constable here.' (Applause.)

"William Willis was accordingly directed by a constable to leave the court, which he did."

The report in the *Newcastle Daily Chronicle* then narrated a discussion, which arose between Mr. Simey and the defendant, as to whether the plaintiff had been justly ordered to quit the court, and then concluded as follows:—

"The Court then proceeded to go over the remainder of the claims, none of which possessed any special interest."

Upon the circumstances stated in the foregoing report, the judge of the county court held that the question of "interruption" having been decided in a particular way by a person sitting as a revising barrister, and in that capacity exercising a judicial discretion, the discretion of the revising barrister could not be reviewed by the county court. The plaintiff was therefore nonsuited, but leave to appeal was granted. A rule to set aside the nonsuit and for a new trial was obtained, upon the grounds that the defendant had no jurisdiction to order the plaintiff to be turned out of the court by the constable, that no circumstances existed to entitle the defendant to exercise the powers conferred upon revising barristers by the statute 28 & 29 Vict. c. 36, s. 16, that the defendant never exercised, or assumed to exercise, those powers, and that there was no evidence of any such circumstances as aforesaid, and that there was no evidence that the defendant ever

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exercised, or assumed to exercise, the said powers, and upon the ground that, upon the evidence, the judge of the county court was wrong in directing a nonsuit.

June 2. *C. P. Butt, Q.C.* (*John Edge* with him), shewed cause. The defendant, holding a judicial office, decided that it was proper to eject the plaintiff from the court, and the exercise of the powers conferred upon revising barristers by the County Voters Registration Act, 1865, s. 16 (1), cannot be called in question in another court by means of an action: Broom's Legal Maxims, 5th ed., pp. 85, 86. It is submitted on behalf of the defendant that, even if the plea is not proved, and if the defence cannot be sustained under the foregoing statute, yet the action must fail under the ordinary rule of the common law; it is well established that the judge of any court doing an act within his jurisdiction, and exercising his discretion, is not liable to be sued for an injury inflicted upon another person, whatever mistake he may have committed. Thus, in *Garnett* v. *Ferrand* (2), it was held that trespass could not be maintained against a coroner for turning a person out of a room where he was about to take an inquisition. In *Scott* v. *Stansfield* (3), it was held that an action will not lie against the judge of a county court for slanderous words uttered whilst he is sitting in court, although they may be spoken falsely and maliciously, and are irrelevant to the matter before him; the principles laid down in that case by the judges of the Court of Exchequer strongly support the contention for the defendant. *Kemp* v. *Neville* (4) shews that there is no difference as to the immunity of judges from actions between courts of record and those not of record. *Brittain* v. *Kinnaird* (5) establishes that the

(1) By the County Voters Registration Act, 1865 (28 Vict. c. 36) s. 16, "It shall be lawful for any revising barrister, whether revising the lists of a county, city, or borough, to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same; and it shall be the duty of the chief constable, commissioner, or chief officer of police of the county, city, borough, or place in which the court is held, to take care that an officer of police do attend that court during its sitting for the purpose of keeping order therein, and to carry into effect any order of the revising barrister as aforesaid."

(2) 6 B. & C. 611.

(3) Law Rep. 3 Ex. 220.

(4) 10 C. B. (N.S.) 523.

(5) 1 B. & B. 432.

decision of a judicial officer as to a matter within his jurisdiction is conclusive, although it is wholly unwarranted by the evidence given before him. This Court ought not to inquire whether the defendant exceeded his jurisdiction: *The Queen* v. *Bolton.* (1)

Sir Hardinge Giffard S.G. (*Gainsford Bruce* with him), in support of the rule. The argument for the defendant assumes that he had power to order the plaintiff to quit the court where he was sitting as revising barrister. This is a fallacy. The defendant had jurisdiction to determine who were, and who were not, entitled to be registered as voters, but he had not jurisdiction to punish the plaintiff for misconduct alleged to have been committed in the previous year.

[BRAMWELL, B. I incline to think that the County Voters Registration Act, 1865, s. 16, confers no additional jurisdiction upon revising barristers whilst they are holding their courts; the only effect of the enactment seems to be to provide an officer of police to assist them in maintaining their authority.]

It is not denied on behalf of the plaintiff that a revising barrister has a general jurisdiction to maintain order; he is in effect empowered to discharge one of the duties of the returning officer (2) before the Reform Act, who had power to remove even a voter if he disturbed the proceedings at an election: *Spilsbury* v. *Micklethwaite* (3); but here the plaintiff did not either interrupt the business of the court or disobey the lawful orders of the defendant. *Houlden* v. *Smith* (4) shews that the judge of a county court may make himself liable to an action for an act done, when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends; and although a Court may have original jurisdiction, yet if process be awarded without jurisdiction, an action will lie against the judge: *Smith* v. *Boucher* (5); *Martin* v. *Marshal & Key.* (6)

[GROVE, J. It used to be said that, except in two cases, a judge of the superior Courts was not liable to be sued for any act done by colour of his office, or for any omission in his judicial duties;

(1) 1 Q. B. 66; 10 L. J. (M.C.) 49.

(2) As to the powers of a returning officer under the Ballot Act, 1872 (35 & 36 Vict. c. 33), see *Clementson* v. *Mason*, Law Rep. 10 C. P. 209.

(3) 1 Taunt. 146.

(4) 14 Q. B. 841.

(5) Cas. t. Hardwicke, 62, 69.

(6) Hob. 63.

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the excepted cases were a false statement as to a bill of exceptions, 3 Blackstone Com., p. 372, and a denial of a writ of habeas corpus under 31 Car. 2, c. 2, s. 10. He might be impeached or removed, but he could not be sued in a court of justice.]

The judges of a superior Court are protected by reason of their general jurisdiction; a revising barrister stands upon a different footing. It is the defendant who has to make out a justification, for he admits that the liberty of the subject has been interfered with by turning the plaintiff out of court.

[BRAMWELL, B. It has been held that no general jurisdiction was vested in the Court of Divorce to exclude the public and hear cases in camerâ: *H.* v. *C.* (1)]

It follows from *Pease* v. *Chaytor* (2) that a bonâ fide belief on the part of a judicial officer does not protect him if he exceeds his jurisdiction. (3)

Cur. adv. vult.

June 15. The following judgments were delivered:—

BRAMWELL, B. I have no doubt that the learned defendant thought he had power to deal with the plaintiff as he did, and that in so doing he was making a proper use of that power; but whether he had or had not power to do what he did, in the sense of not being liable to be made responsible for it, there can be no doubt that he had no right to, and in my judgment was very wrong to, do as he did; for the plaintiff was absolutely free from all blame on the occasion in question. I say nothing, I am incapable of forming any opinion, as to whether the plaintiff had on a former occasion done anything that deserved censure; but on the occasion in question he certainly had not. He had answered certain questions of the defendant—by what authority put, I know not—he answered them truthfully, and was turned out of Court, not for his then conduct, but for that of a year back. No doubt there are

(1) 29 L. J. (P. & M.) 29; see the authorities collected in Browne's Principles of Law and Practice in Divorce (3rd ed.), 256.

(2) 1 B. & S. 658; 31 L. J. (M.C.) 1.

(3) At the conclusion of the argument it was pointed out by Bramwell, B., that upon the facts stated it did not appear that any trespass had been committed, the plaintiff having quitted the Court voluntarily; but Butt, Q.C., replied that the defendant did not wish for judgment upon this ground.

(1) sc 8 Jur. N.S. 482.

cases, in which it is desirable that judges and persons in the position of the defendant should express disapprobation of improper conduct, that it may not be supposed that silence gives consent; and I doubt not, as I have said, that the defendant thought he ought to do so on this occasion; but he could have no right to punish the plaintiff for former conduct by turning him out of court; and in this sense it cannot be denied that the defendant's act was wrong and unlawful. But it was urged before the able judge of the county court and repeated before us, that the defendant, having power to turn the plaintiff out of court for some cause, must be deemed to have done so for such cause on the present occasion; that otherwise it would be impossible for the judges to do their duty with safety, as they would be subject to actions, the decision of which would rest with a jury, as to whether they acted under an authority they possessed or on some other ground, and whether they were acting bonâ fide. The result of this argument would be, that, because a revising barrister could properly turn a person out of court for one reason, namely, when he was disturbing the business, he could do so with impunity for any or no reason, when he was not, on the pretence that he was. This is somewhat startling; but the arguments in support of it are strong, and what was said by Lord Tenterden in *Garnett* v. *Ferrand* (1) undoubtedly favours the contention. But I think the question does not arise. The defendant did not profess to turn the plaintiff out of court on the ground that he was disturbing the business; I do not say that any judgment should have been pronounced or minute of proceedings kept that the plaintiff was turned out of court for such a reason; what I do say is, that that was not, and was not professed or stated to be, the reason for his expulsion. He was expelled as a punishment, or because he was unfit to be in court. It may be that a revising barrister has authority to expel others than those who are disturbing the business of the court. If the defendant here had pleaded that he deemed it right for the due conduct of the business of the Court that the plaintiff should be expelled, the question of his right to do so would have arisen. But he has not so pleaded; he has pleaded that he expelled him because he was disturbing the Court; that was not so, and the

(1) 6 B. & C. 611, at p. 625.

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plea is not true. I do not mean that it is dishonestly untrue; no doubt it is supposed to be the true way of stating the defence; but it is in fact untrue. I think, therefore, there must be a new trial. It may be said that this will give rise to the same questions, which it is not desirable a judge should be subject to; but it does not. A judge has only to say that he adjudged that it was desirable that the party should be removed, if that is a defence. Besides, this argument must not be pressed too far; for suppose the court was held at an inn, and about the time it was over the revising barrister ordered a guest to be turned out of a room. It cannot be doubted that an action would lie if the court was over; but in such action a question for a jury would arise, namely, whether the court was over. Anyhow there can be no law which compels us to affirm what we know to be untrue, and say that the defendant expelled the plaintiff because he was disturbing the Court. I repeat, I think there must be a new trial, no damages having been assessed. I say nothing about an amendment setting up such a defence as I have supposed possible, except that I should regret to see it pleaded, as I feel sure that in truth the learned defendant did not turn the plaintiff out of court for any such reason, but to punish him. The defendant has very handsomely admitted that the act of turning the plaintiff out of court was his, and I should be glad if he would further admit it was wrongful.

BRAMWELL, B., read also the following judgment of

GROVE, J. I agree, and will only add that as, for the purpose of this motion, we are to take the newspaper report to be correct, it is clear that the plaintiff was turned out of court, not for any disturbance, misconduct, or contempt, or for any reason which rendered his expulsion necessary for due decorum in the proceedings of the Court, but for alleged past misconduct with reference to a voter, not with reference to the Court; and the expulsion was in the nature of a sentence awarding punishment, and not in the nature of a summary committal essential to the maintenance of order in judicial proceedings. It was the exercise of a jurisdiction which the defendant did not possess, and not an erroneous mode of action or an excessive exercise of a jurisdiction which

he did possess. Although nothing wrong was intended by the defendant, yet it seems to me that if his act were sanctioned by law, which I am of opinion it is not, the law would sanction an arbitrary usurpation of jurisdiction where there is none, and a defence of such usurpation which would not be true in fact, namely, that which states as the ground of the expulsion the exercise of a jurisdiction which the defendant rightly had and an act within it as a justification for an act in the exercise of a jurisdiction which he clearly had not.

Rule absolute.

Solicitor for plaintiff: *G. J. Brownlow, for H. Ritson, Sunderland.*

Solicitors for defendant: *Johnson & Weatherall, for F. M. Bowey, Sunderland.*

[IN THE COURT OF APPEAL.]

June 22.

HOWES, APPELLANT; THE BOARD OF INLAND REVENUE, RESPONDENTS.

Refreshment House—Licence—23 *Vict. c.* 27, *s.* 6—"*Entertainment.*"

By s. 6 of 23 Vict. c. 27, "all houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment" during certain hours of the night are to be deemed refreshment houses, and require a licence. By s. 9 a penalty is imposed upon keeping unlicensed refreshment houses. During the prohibited hours the appellant kept open without a licence a shop for the sale of ginger-beer and lemonade; it consisted of one room only, open in front, without seats. The appellant was convicted of keeping an unlicensed refreshment house:—

Held (by James and Mellish, L.JJ., and Quain, J., affirming the judgment of the Court of Appeal from Inferior Courts, Baggallay, J.A., dissenting), that the appellant's shop was kept open for public refreshment, resort, and entertainment within the meaning of the foregoing enactment, and that the conviction was right.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

A summons was issued under s. 6 of 23 Vict. c. 27 (1), upon

(1) 23 Vict. c. 27, is intituled "An Act for granting to Her Majesty certain Duties on Wine Licences and Refreshment Houses, and for regulating the licensing of Refreshment Houses and the granting of Wine Licences."

Sect. 1. "From and after the 1st day of July, 1860, there shall be charged,

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the application of James Peake, an officer of excise, against the appellant, charging that the appellant, on the 21st of February, 1875, at Southwark, did keep a refreshment house, for which a licence was required by the Act, without taking out, or having taken out, or having in force a proper licence in that behalf granted to him under the authority of the above Act.

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levied, and paid unto and for the use of Her Majesty, her heirs and successors, for and upon the several licences hereinafter mentioned, the respective rates and duties following, that is to say, for every licence to keep a refreshment house;" the section then contains a scale of rates and duties.

Sect. 6. "All houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine, or spirits respectively, shall be deemed refreshment houses within this Act; and the resident owner, tenant, or occupier thereof shall be required to take out a licence under this Act to keep a refreshment house."

Sect. 9. "Every person who shall keep a refreshment house for which a licence is required by this Act, without taking out and having in force a proper licence in that behalf granted to him under the authority of this Act, shall forfeit a sum not exceeding 20*l*."

"Schedule No. 1.

"Form of Licence to the Keeper of a Refreshment House.

"We, the undersigned, being the collector and supervisor of excise for the collection of and district of , do hereby authorize and empower , now being a householder and dwelling in a house in , in the parish of , within the limits of the said collection and district, to keep open the said house as a refreshment house, and to sell any victual or refreshment to be consumed therein, and in the premises thereunto belonging (provided that for the sale of any excisable liquor he shall have in force a proper licence granted to him in that behalf), and for this licence he hath paid the sum of , the said house and premises being of [or under, as the case may be,] the value of twenty pounds a year; and this licence is granted upon condition that the said do not wilfully or knowingly permit any drunkenness or any violent or quarrelsome or other disorderly conduct in his house or premises, nor knowingly suffer any unlawful games or any gaming whatsoever therein, nor knowingly suffer or permit persons of known bad character to assemble and meet together therein, but do maintain good order and rule therein: and this licence shall continue in force from the day of until the first day of April next ensuing, and no longer; and this licence shall cease and determine, and shall become void, in case any of the conditions or regulations contained therein shall be transgressed or shall not be observed by the said .

"Given under our hands this day of 186 .

, Collector.

, Supervisor."

By 24 & 25 Vict. c. 91, s. 8, ten o'clock at night is substituted for nine in the description of a refreshment house requiring a licence.

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The following facts were proved or admitted:—

The appellant was not licensed for the sale of beer, cider, wine, or spirits respectively, and had not taken out any licence to keep a refreshment house; he did not sell articles which required any excise licence beyond a refreshment house licence; the appellant's shop consisted of one room only, open in front, without seats of any kind, and the persons who frequented the shop simply drank their ginger-beer or lemonade at the counter and went away. He kept his shop open until two or three o'clock in the morning.

The following points were raised on behalf of the appellant:—That he did not keep a refreshment house requiring him to take out a licence within the meaning of the statute; that the words "refreshment, resort, and entertainment" in s. 6 of the Act must be read together and could not be separated; that ginger-beer and lemonade were not refreshments within the statute; that there was no means of resting or sitting down upon the appellant's premises, and therefore that there was no entertainment within the statute.

The magistrate convicted the appellant of the said offence in a penalty of 5*l.*

The question was whether the shop so occupied, kept, and used by the appellant was or was not a refreshment house within the statute.

Jan. 27, 28. In the Court of Appeal from Inferior Courts. D. C. A.

McIntyre, Q.C. (*J. Thompson* with him), for the appellant. The conviction is wrong. In order to constitute a refreshment house within the statute there must be public refreshment, resort, and entertainment. In this case there is no entertainment, which is something quite distinct from refreshment: *Muir* v. *Keay*. (1) The ginger-beer and lemonade are refreshment, and not entertainment. The appellant's shop afforded no accommodation for his customers, there were no seats to induce them to remain. *Taylor* v. *Oram* (2) is a strong authority for the present appellant, for it shews that even a dancing-room with seats and tables, where beer may be obtained and drunk, is not necessarily a refreshment house within the meaning of 23 Vict. c. 27, s. 6.

(1) Law Rep. 10 Q. B. 594. (2) 1 H. & C. 370; 31 L. J. (M.C.) 252.

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C. S. C. Bowen, for the respondents. This case cannot be distinguished in principle from *Muir* v. *Keay*. (1) It can make no difference whether the refreshments sold in the shop are supplied to the customers whilst sitting or standing; in either case they are received and accommodated, and therefore they are entertained. A room at a railway station, where the passengers are supplied with refreshments whilst standing at a counter, is certainly a place of entertainment, and the appellant's shop differs from a room of that kind only in this, that the refreshments are of a cheaper description.

McIntyre, Q.C., in reply.

Judgment, D. C. A.

FIELD, J. There being a difference of opinion amongst us as to the decision of this case, it becomes my duty as the junior member of the bench to state first the conclusion at which I have arrived. In my opinion the conviction was right and ought to be affirmed. The charge against the appellant was that he had kept a refreshment house without a licence, and that he had thereby contravened 23 Vict. c. 27, s. 6. It is, therefore, necessary to examine that statute, and it appears to me to have been passed with a twofold object: it was intended first to grant to the Crown duties upon licences; and, secondly, to preserve order in houses kept for the consumption of refreshments. The object of the legislature is sufficiently plain from the title of the statute, and the forms in the schedule. By the 1st section duties are imposed upon "every licence to keep a refreshment house;" and by the first form of licence in the schedule the officers of excise authorize and empower the grantee of the licence to keep open his house "as a refreshment house." The question which we have to determine is, what is a refreshment house, and that is defined by the sixth section of the Act; it thereby appears that a shop may be a refreshment house, and it is stated in the case that the appellant kept a shop, although it consisted of one room only; he, therefore, occupied such a building as is contemplated by the statute. Before, however, the appellant can be convicted it must be established that the shop was kept open for "public refreshment, resort, and entertainment." Upon the facts, it certainly seems to me to

(1) Law Rep. 10 Q. B. 594.

have been kept for public resort, for it was open in front, was not shut until two or three o'clock in the morning, and any person who wished could go in. It was certainly open for public refreshment, because the business carried on there was to supply those who came in with ginger-beer or lemonade. I agree that the mere casual supply of lemonade or ginger-beer might not, perhaps, contravene the statute; for that would hardly constitute public refreshment. It is a question of degree. An ordinary chemist's shop, where, as often happens, lemonade is sold, is not kept open for refreshment, but a case may be imagined where a chemist nominally sells drugs, yet really makes it his object to sell a very good kind of ginger-beer; in such an instance it may be properly held that he, in point of fact, keeps his shop open for the sale of refreshment. Every case must depend upon its own circumstances; but upon the facts before us I come to the conclusion that the appellant's shop was kept open for the sale of public refreshment. I agree that the words of the statute are cumulative, and that in order to constitute a breach of the statute there must be refreshment, resort, and entertainment; but, I think, that there was evidence of entertainment; the appellant's shop remained open until two or three o'clock in the morning, and persons entering it might stay, as long as they were taking the refreshment with which they were served.

The decision in *Taylor* v. *Oram* (1) turned upon the effect of the findings of the magistrate: in the present case, as the magistrate has convicted, he has found as a question of fact that the appellant's shop was kept open as a refreshment house.

The decision in *Muir* v. *Keay* (2) is certainly not opposed to the opinion which I have formed, and I do not think that any of the reasons given by the judges in that case tend to shew that the view which I have adopted is wrong. I cannot come to the conclusion that this case is different in principle from *Muir* v. *Keay* (2) merely because the present appellant's shop is without seats, and his customers are content to take their refreshment standing before the counter at which the ginger-beer and lemonade are sold. For these reasons I am clearly of opinion that the conviction must be affirmed.

(1) 1 H. & C. 370; 31 L. J. (M.C.) 252. (2) Law Rep. 10 Q. B. 594.

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GROVE, J. I have arrived at the same conclusion as my Brother Field, and think that this conviction should be affirmed. I agree with what was said by my Brother Blackburn in *Muir* v. *Keay* (1): "The question must always be one of more or less, and the facts of each particular case must be looked at as they arise." The present is a marginal case, and I find it difficult to lay down an accurate definition of the word "entertainment," which alone gives rise to doubt. I do not think that we can decide this case merely upon the interpretation of that word as found in dictionaries; but it may be useful to notice that in Webster's its meaning, amongst others, is said to be "the receiving and accommodating of guests either with or without reward," and also, "reception, admission." Other definitions are given with respect to another sense of the word, namely, when it is applied to amusement; but I do not think that it is used in that sense in the present statute. In endeavouring to ascertain its meaning we may observe that "entertainment" is used in conjunction with "refreshment" and "resort," and these words throw some light upon its interpretation. I do not think that any doubt can be felt that the appellant's shop was a place of public resort, for persons came in at their pleasure. My Brother Blackburn in *Muir* v. *Keay* (1) appears to think that the word "entertainment" is used in the sense of "reception" and "accommodation." Now, there are only two things to which the word accommodation can be fairly applied, the shop itself, which I take to be a room with a ceiling to it and not a mere open stall, and a counter where the refreshments were supplied. If it is borne in mind that "entertainment" is joined with the words "refreshment" and "resort," can it be said that the magistrate was wrong in finding that the appellant's shop came within the prohibition of the statute, and in convicting the appellant? I cannot hold that he was wrong. I think that at the appellant's shop there was reception and admission, and, to some extent, accommodation for his customers, and that what was supplied to them was refreshment.

I am, therefore, of opinion that the conviction must be affirmed.

CLEASBY, B. I cannot agree with the conclusion at which my

(1) Law Rep. 10 Q. B. 594, at p. 597.

learned Brothers have arrived. I am not satisfied that the appellant kept his shop open for public entertainment. The question for our decision turns upon the construction of 23 Vict. c. 27, s. 6, which requires the owner or occupier of a house or shop to take out a licence, if it is kept open for "public refreshment, resort, and entertainment." No doubt the appellant's shop was open for "public refreshment" and "resort"; but effect must be given to the word "entertainment," and I feel a difficulty in coming to the conclusion that there was anything more than refreshment and resort. Upon the facts stated, I cannot find anything in the nature of entertainment. I should come to this conclusion without the aid of the authorities mentioned during the argument. I need not refer to *Taylor* v. *Oram* (1); but I will cite *Muir* v. *Keay* (2), which seems to me to shew conclusively that the statute requires something besides refreshment and resort, and points out what that something must be; in addition to these there must be "reception." If there were any place into which it might fairly be said that the appellant's customers were received for the purpose of shelter, rest, or recreation, I should be satisfied that a breach of the statute had been committed. My Brother Blackburn appears to have been of opinion that reception was proved in *Muir* v. *Keay* (2), because a room was provided where thirty or forty persons remained together as long as they liked in the enjoyment of shelter, of rest, and of opportunities for conversation and society. The view of my Brother Lush in that case is put upon a clear ground, and he remarks in the course of his judgment (p. 598): "I think entertainment is something connected with the enjoyment of refreshment—rooms, tables, and the like. It is something beyond refreshment; it is the accommodation provided, whether that includes a musical or other amusement or not." Here there is nothing in the nature of accommodation; and before I can come to the conclusion that a licence ought to be obtained, I must be satisfied that the house or shop is kept open for something besides refreshment and resort. It is easy to understand that it may be expedient to require a licence for a house where such a "reception" as I have alluded to takes place; but, on the other hand, it may be of great importance not to impose the duty of taking out

(1) 1 H. & C. 370; 31 L. J. (M.C.) 252. (2) Law Rep. 10 Q. B. 594.

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a licence upon a person who carries on a business so small and insignificant as that described in the case before us. I cannot think that a licence is required for a stall, at which early in the morning tea, coffee, and hot potatoes are sold, although it may possibly be a room; no doubt there is public refreshment at, and resort to, a stall of that kind; but certainly there is not entertainment. For the foregoing reasons, I am of opinion that the conviction was wrong, and that our judgment ought to be for the appellant.

Judgment for the respondents.

C. A.

On appeal,

June 22. *McIntyre, Q.C.*, and *John Thompson*, for the appellant. It is admitted that the appellant's shop was kept open for "public refreshment," and also, perhaps, "resort," but not for entertainment, which must mean something not comprehended in the two former words; it signifies reception and accommodation; there was no entertainment, for there were no seats or tables of any kind in the shop; the appellant's customers had not the means of remaining as long as they pleased, and therefore they were not entertained.

[QUAIN, J. It was not expressly found in *Muir* v. *Keay* (1) that the appellant's café contained chairs and tables for the accommodation of his customers; and yet it was held by the Queen's Bench that he was liable to be convicted of keeping an unlicensed refreshment house.

MELLISH, L.J. *Muir* v. *Keay* (1) was a clear case; the facts before us admit of more argument. The word "public" is perhaps inserted to shew that it was not intended to include within the operation of the statute houses like the clubs in London, where only certain persons, such as members or subscribers, have the right of admission.]

It is a principle observed in the interpretation of statutes as to the public revenue, that the subject shall not be taxed unless the intention of the legislature be clear: per Bayley, J., in *Leeds and Liverpool Canal Co.* v. *Hustler* (2); Dwarris on Statutes, 2nd ed. p. 646; here it is by no means clear that the language of 23 Vict.

(1) Law Rep. 10 Q. B. 594.

(2) 1 B. & C. 424, at p. 425; see also per Pollock, C.B., in *Baddeley* v. *Gingell*, 1 Ex. 319, at p. 332.

c. 27, s. 6, applies to the appellant's shop, and therefore he ought to be held exempt.

[QUAIN, J. An aquarium is a place of entertainment: *Terry* v. *Brighton Aquarium Co.* (1); *Warner* v. *Brighton Aquarium Co.* (2)]

The decision in those cases turned rather upon the word "amusement," which occurs in 21 Geo. 3, c. 49, s. 1.

C. S. C. Bowen, for the respondents. Upon the facts stated, accommodation is provided for consuming the ginger-beer and lemonade sold by the appellant; and this is sufficient to constitute entertainment within the meaning of the statute.

McIntyre, Q.C., did not reply.

Judgments, C. A.

JAMES, L.J. I think that the judgment of the majority of the Court of Appeal from Inferior Courts must be affirmed. It is very difficult to find a meaning for the word "entertainment," which will not include the facts of this case; in the appellant's shop the public are received, sheltered, and refreshed, and in any point of view this is sufficient to constitute "entertainment."

MELLISH, L.J. I am of the same opinion. The whole question arises upon the effect to be given to the word "entertainment." The main object of the enactment was to deal with houses and shops where refreshments may be consumed upon the premises. It is true that in the 6th section the words "resort" and "entertainment" are inserted besides "refreshment;" but I do not think it imperative to hold that "entertainment" must necessarily be something entirely distinct from "refreshment." It seems to me that "entertainment" qualifies "refreshment," and that the two words taken together mean in the statute the receiving of a customer and the providing him with drink and food of an agreeable nature. When a guest is received into the house of a friend, and drink and food of an agreeable nature are placed before him, he is entertained; and in my opinion a man is not the less entertained because he is not asked to sit down whilst he takes refreshment. I think that persons who are supplied with ginger-beer, and to whom sufficient accommodation is furnished to enable them to

(1) Law Rep. 10 Q. B. 306. (2) Law Rep. 10 Ex. 291.

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drink it comfortably, do obtain entertainment within the meaning of the statute. Consequently, in my opinion, the judgment of the majority of the Court below ought to be affirmed.

BAGGALLAY, J.A. I am unable to take the same view as the other members of this Court. I do not think that the appellant's shop was "kept open for public refreshment, resort, and entertainment," within the meaning of 23 Vict. c. 27, s. 6. I agree with the view expressed by Lush, J., in *Muir* v. *Keay* (1); and, in my opinion, in order to constitute "entertainment," there must be something beyond the mere fact of selling ginger-beer or lemonade to a customer who drinks it at a counter and then goes away. I also concur in the words of Blackburn, J., who says (p. 597) that entertainment "is rather the correlative of resort—the reception and accommodation of the public who resort to the place in question. It is not a useless word. It does not apply to the mere giving of refreshment, nor to the mere fact of persons coming in; it means public reception." I think that the facts in the case which I have mentioned were of a widely different kind from those in that before us; and I doubt whether there was public "resort" to the present appellant's shop. I think that the conviction was wrong and ought to be quashed.

QUAIN, J. I am of opinion that the judgment of the majority of the Court of Appeal from Inferior Courts ought to be affirmed. It is not denied that the appellant's shop is opened for refreshment, and I do not share the doubts of Lord Justice Baggallay as to its being open for public resort, for any one wanting to buy lemonade or ginger-beer may enter it. I also think that the shop afforded entertainment to the appellant's customers; for refreshment was sold, and a man cannot be refreshed without being at the same time entertained. Moreover, I think the facts stated fall within the mischief which the Act was intended to remedy.

Judgment affirmed.

Solicitors for appellant: *Hicklin & Washington.*
Solicitor for respondents: *Solicitor to the Inland Revenue.*

(1) Law Rep. 10 Q. B. 594, at p. 598.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

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May 5.

SHEFFIELD, APPELLANT; THE BOARD OF WORKS FOR THE FULHAM DISTRICT, RESPONDENTS.

Sewer—Street—New Street—Apportionment—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53, 112.

25 & 26 Vict. c. 102, s. 52, enacts: "Where any sewer shall . . . . be constructed by any . . . . district board in or for the drainage of any new street . . . . the expense . . . . shall be . . . . defrayed by the owners of such street . . . . and of the land bounding or abutting" thereon. Sect. 53 enacts: "Where any sewer shall be constructed by any . . . . district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense . . . . shall be . . . . defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively . . . . and the residue of such expenses shall be defrayed by the . . . . district board out of sewers rates levied in their . . . . district." By s. 112 "new street" includes streets to be formed after the 7th of August, 1862. The appellant was the owner of a piece of land within the respondents' district, upon which streets had been laid out since the 7th of August, 1862; certain building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The respondents laid down sewers in the streets and apportioned the whole of the cost between the appellant, his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon the appellant's land, although no sewer had previously existed in the streets thereon:—

Held, that the word "street" in s. 53 included "new streets" as defined by s. 112, as well as old streets, that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by the respondents out of the sewers rate levied in their district:

Semble, that even if s. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was the owner in fee of a piece of land; along it ran a street called Field Road, terminating at one end at a cemetery, and at the other in Greyhound Road. Eight streets, named respectively, John Street, Francis Street, Dawson Street, Chelmsford Street, Suffolk Street, Norfolk Street, Hatfield Street, and Milton Street, ran out of Field Road on either side thereof, at right angles to it. All these streets were upon the appel-

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lant's land, and had been formed and laid out since the 7th of August, 1862. The land bounding and abutting upon the appellant's piece of land, and upon the ends of the eight streets before mentioned did not belong to him; it was building land, and the eight streets were not prolonged beyond the appellant's land. The cemetery did not belong to him. Field Road and the eight streets before mentioned not being sewered to the satisfaction of the respondents, they resolved that, "the said streets be sewered under the provisions of 18 & 19 Vict. c. 120 and 25 & 26 Vict. c. 102." The expenses of the construction of the sewers, and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewers at the intersection of streets, and other incidental charges, were apportioned by the respondents, and the amount charged against the appellant came to 420*l*. A part of the expenses of the construction of the sewers was apportioned upon the owners of the cemetery, but the whole of the rest of the expenses was apportioned upon the appellant or his tenants, and no part thereof was apportioned upon the owners of the building land bounding or abutting upon the ends of the said eight streets. Sewers rates had been levied, for many years previously to the passing of the resolution for the construction of the sewers, on the appellant as owner of the houses situate in the streets respectively, and on the owners of the land bounding and abutting on such streets, and abutting on the ends thereof, although there was no sewer in such streets: no portion of the said expenses and costs was proposed by the apportionment to be defrayed by the respondents. A plan of the sewers intended to be constructed in accordance with the resolution had been submitted to and sanctioned by the Metropolitan Board of Works.

The appellant having been summoned for non-payment of the amounts apportioned upon him, the foregoing facts were proved at the hearing.

It was contended for the appellant that he was not liable to pay the amounts, first, because no portion of the expense was apportioned to each of the owners of the land bounding or abutting on the ends of the streets; secondly, because, notwithstanding sewers rates had been levied in respect of the appellant's houses and land previously to the passing of the resolution for the con-

struction of the sewers, yet the whole, and not a part only, of the expenses and costs was apportioned to be borne and defrayed by the appellant, his tenants, and the owners of the cemetery.

The magistrate ordered payment by the appellant of the amounts charged upon him.

The question for the opinion of this Court was, whether the appellant was liable to be ordered to pay the said amounts. (1)

April 28, 29; May 5. *R. V. Williams* (*J. O. Griffits, Q.C.*, with him) for the appellant. It is submitted that the apportionment is wrong, and cannot be sustained under either s. 52 or s. 53 of the Metropolis Management Amendment Act, 1862 (2), for no part of the cost of constructing the sewers is to be defrayed either by the owners of the building land bounding and abutting upon the ends of the streets under s. 52, or by the respondents under s. 53.

(1) Other objections were urged before the magistrate on behalf of the appellant, but owing to the view taken by the Court it is unnecessary to mention them.

(2) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 21, "It shall be lawful for the said Metropolitan Board, and they are hereby authorized and empowered, during the construction of any works by them under the recited Acts or this Act, subject to the provisions of such Acts, to cause to be stopped up all or such part of the carriage or footway of any streets, roads, or ways as shall be necessary for the due execution of the said works."

Sect. 52: "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January, 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just."

Sect. 53: "Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district."

Sect. 112: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out," that is, after the 7th of August, 1862.

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[DENMAN, J. Ought not the appellant to have appealed against the apportionment to the Metropolitan Board of Works under 25 & 26 Vict. c. 102, s. 57?]

It is submitted that he need not, because the respondents had no jurisdiction to make the apportionment: *Whitchurch* v. *Fulham Board of Works.* (1) No doubt the discretion exercised by them in fixing the amounts to be contributed under apportionments lawfully made cannot be questioned in this Court: *Nesbitt* v. *Greenwich Board of Works* (2); *London and North Western Ry. Co.* v. *Vestry of St. Pancras* (3): but here the respondents have exceeded their powers, and have thrown the whole expense of constructing the sewers upon the appellant, his tenants, and the owners of the cemetery.

Biron, for the respondents. The apportionment has been made under s. 52; for, as all the streets upon the appellant's land were "new streets" within the Metropolis Management Acts, the respondents could not proceed under s. 53, which applies only to old streets.

[BRAMWELL, B. Why does not the word "street" in s. 53 comprehend "new streets" as well as old? If it does, the respondents ought to have made the apportionment under it, and not under s. 52; for in the present case all the other incidents of s. 53 are fulfilled.]

It seems to follow from *Dryden* v. *Overseers of Putney* (4), that in the Metropolis Management Acts "street" does not include "new streets" as therein defined; but if s. 53 is applicable to the present case, it must be admitted that the apportionment is based upon a wrong principle.

R. V. Williams did not reply.

BRAMWELL, B. I am of opinion that the appellant is entitled to our judgment. Previously to the construction of the sewers by the respondents there was no sewer in the appellant's land, but sewers rates had been paid in respect of his houses; therefore some portion of the expense incurred by the respondents in constructing the sewers ought to be borne by them, pursuant to the provisions of s. 53. It has been, however, contended before us by

(1) Law Rep. 1 Q. B. 233.
(2) Law Rep. 10 Q. B. 465.
(3) 17 L. T. (N.S.) 654.
(4) Ante, p. 223.

the respondents' counsel that the apportionment is valid, and that s. 53 does not apply; and it has been argued that the word "street" is to be taken to mean exclusively old streets, and does not include "new streets" as defined by 25 & 26 Vict. c. 102. It would seem to follow from this contention that wherever the word "street" occurs in the Metropolitan Management Acts it must be taken as comprehending only old streets; but it is manifest that this cannot be its true interpretation. The 21st section of 25 & 26 Vict. c. 102, which gives power to stop up streets during the execution of works, must apply to "new streets" as well as old, although the word "street" alone is used therein; and I think that in s. 53 it must receive the wider interpretation. The order of the magistrate must be quashed.

DENMAN, J. I am of the same opinion. After the argument which we have heard, I think it clear that s. 53 applies to this case, and that the apportionment is bad because it throws the whole expense of constructing the sewers upon the appellant and his tenants as owners of the houses, and upon the owners of the cemetery, without apportioning any part thereof upon the respondents' district.

I may mention that, even under s. 52 the apportionment seems to me to be bad, for no portion of the cost of constructing the sewers is imposed upon the owners of the land bounding and abutting upon the ends of the eight streets referred to in the case. I do not, however, express any definite opinion as to this, as it is not a matter necessary to our decision.

BRAMWELL, B. I concur in my Brother Denman's remarks as to whether the apportionment could be sustained under s. 52.

Judgment for the appellant. (1)

Solicitors for appellant: *Sheffield & Sons.*
Solicitors for respondents: *Watson, Sons, & Room.*

(1) But see *Sawyer* v. *Vestry of Paddington*, Law Rep. 6 Q. B. 164, where Blackburn and Lush, JJ., dissenting from *Vestry of St. Giles, Camberwell* v. *Weller*, Law Rep. 6 Q. B. 168 (n.), held that 25 & 26 Vict. c. 102, s. 53, applies only to old streets.

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May 18.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

THE BOARD OF WORKS FOR THE FULHAM DISTRICT, APPELLANTS; GOODWIN, RESPONDENT.

Sewer—New Street—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 44, 52, 112.

The respondent, within the limits of the Metropolis Management Acts, and with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of the M. road, in which he owned certain houses, and which was a "new street" within the meaning of the above-mentioned Acts. Afterwards the appellants took up the sewer constructed by the respondent, and in place thereof laid down another for the drainage of the neighbourhood:—

Held, that the respondent was not liable to pay any portion of the cost of the sewer laid down by the appellants.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

Complaint was made by the appellants of the non-payment by the respondent of the sum of 646*l.*, as owner of certain premises situate and being in Mayland Road, in respect of certain sewer-works, Mayland Road having been formed and laid out as a new street since the 7th of August, 1862, and a summons having been issued, the following facts were proved at the hearing:—

The respondent had been, in 1867, and still was the owner of certain houses in Mayland Road, and the tenants thereof had, previously to the making of the new sewer, paid sewer's rates; he was not the owner of any house or land in Coningham Road, which was a continuation of Mayland Road. On or about the 1st of February, 1867, the Metropolitan Board of Works sanctioned the construction of a sewer in the centre of Mayland Road by the owners, under s. 44 of 25 & 26 Vict. c. 102. Such sewer was built, and drainage works were made at the expense of the respondent, according to plans submitted to and approved by the Metropolitan Board of Works, and extended the entire length of the Mayland Road, about 1050 ft. The construction of a sewer in Coningham Road by the owners, with an outfall into the Uxbridge Road, was sanctioned by the Metropolitan Board of Works, and constructed in two sections: the first section was in accordance

with such sanction; the second section, about 500 ft. in length, was not in accordance with such sanction, its outfall being into the sewer of Mayland Road, instead of into the Uxbridge Road. In April, 1875, the Board of Works for the Fulham district determined to have the sewers before-mentioned taken up and reconstructed. The provisions of the several Acts relating to sewers in force in 1867 were complied with by the respondent in the construction of the sewer in the year 1867. In the month of June, 1875, the district board caused the sewers to be removed, and constructed a brick main sewer throughout the whole of Mayland Road, and a large part of Coningham Road, with man-holes and gullies sufficient to take the sewage of a large and populous neighbourhood; and they connected the drainage of the houses in Mayland Road, and of the several houses in Coningham Road, with the new sewer. The costs and expenses of the works executed in 1875 amounted to the sum of 2527*l.*, and the appellants apportioned the same upon the owners of the houses and land in Mayland and Coningham Roads.

Upon the hearing of the summons, it was contended on the part of the respondent, first, that the apportionment whereby the respondent was sought to be charged, and which amounted to the sum of 646*l.*, was bad in law, because the appellants, having removed the old sewer in Mayland Road, sanctioned and made as before stated, were bound to substitute one as efficient, but not at the cost of the owners; secondly, that the sewer, in respect of which the present claim was made against the respondent, was a sewer for taking the sewage of the whole neighbourhood, including the side streets, and not of the Mayland Road and Coningham Road only, and that therefore the owners of houses in Mayland Road ought not to pay the cost; thirdly, that any sewer replacing an old one vested in the district board ought to be made at the cost of the ratepayers.

The magistrate dismissed the summons.

The question for the opinion of this Court was, whether the respondent was liable to pay the said sum of 646*l.* in respect of the said apportionment.

If this Court should be of opinion that he was so liable, judgment was to be entered for the appellants; but if it should be of

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opinion that he was not so liable, judgment was to be entered for the respondent.

H. T. Boddam for the appellants. The magistrate was wrong in dismissing the summons. The appellants were empowered by the Metropolis Management Amendment Act, 1862, s. 52 (1), to lay down a sewer at the expense of the respondent. Mayland Road was plainly a "new street," within the meaning of the interpretation clause (s. 112), for it has been formed and laid out since the passing of that statute; and whenever a sewer is constructed in a new street by a district board, the expense of the work must be borne by the neighbouring owners, under s. 52: *Sawyer* v. *Vestry of Paddington.* (2)

John Day, Q.C. (*T. R. Kemp* with him), for the respondent. The decision of the magistrate was right. As Mayland Road had already been sewered by the respondent at his own expense, he could not be called upon under s. 52 to pay the cost of a fresh

(1) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 44, "It shall be lawful for the owners or occupiers of any land or premises in any parish, district, or part, within the limits of the metropolis.... with the consent and subject to the regulations and conditions hereinafter mentioned, to construct sewers at their own expense for the purpose of draining such land or premises; and it shall be lawful for any vestry or district board, in whom the sewers in any parish, district, or part are vested, if they shall deem it just and proper so to do, to contribute out of the rates under their control, applicable to the execution of works of sewerage, to the cost of any sewers constructed for the purpose aforesaid."

By s. 47, every person intending to make a sewer shall first obtain the sanction of the vestry or district board.

By s. 48, no vestry or district board shall sanction the construction of any such sewer, without the approval of the Metropolitan Board of Works.

By s. 52. "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board, in or for the drainage of any new street, or of any house or houses erected since the 1st of January, 1856, the expense of constructing such sewer, and the works appertaining thereto, including the cost of gullies, side-entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just."

By s. 112, "The expression, 'new street' shall apply to and include all streets hereafter to be formed or laid out," that is, after the 7th of August, 1862.

(2) Law Rep. 6 Q. B. 164.

sewer laid down by the appellants. The sewer constructed by the respondent vested in the appellants under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 68, and they were bound to repair it, and if necessary to replace it under s. 69. [He was then stopped.]

CLEASBY, B. I do not feel much difficulty in coming to the conclusion that this appeal must be dismissed, on the ground that the facts proved do not render the respondent liable to pay the expenses incurred by the appellants in constructing the sewer in 1875. The sewer laid down by the respondent in 1867 was constructed by him under the Metropolis Management Amendment Act, 1862, s. 44, and pursuant to the Metropolis Management Act, 1855, s. 68, it vested in the appellants; he did all that was necessary in the matter, but in 1875 the appellants caused this sewer to be removed and laid down another. Under these circumstances, it appears to me scarcely arguable that the appellants can call upon the owners of the houses in Mayland Road to pay for the cost of the new sewer. It seems to me unreasonable to hold that after the neighbouring owners have constructed a sufficient sewer in a street, they can afterwards be called upon to contribute to the cost of a fresh sewer. I also think that the appellants could not, under the circumstances, charge the respondent with the cost of the drainage of the whole neighbourhood.

GROVE, J. I am of the same opinion. It seems to me to be the policy of the enactments cited before us to throw in the first instance the cost of constructing sewers in a new street upon the neighbouring owners, but when the street has once been sufficiently sewered, to impose upon the vestry or district board the duty of maintaining and replacing the original sewers out of the funds at their disposal.

FIELD, J., concurred.

Judgment for the respondent.

Solicitors for appellants: *Watson, Sons, & Room.*
Solicitor for respondent: *W. A. Downing.*

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May 25.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

COUSINS *v.* LOMBARD DEPOSIT BANK AND OTHERS.

County Court—Appeal in Suit within Common Law Jurisdiction—Question of Fact—Verdict of Judge sitting without Jury—Motion for New Trial on ground that Verdict was against the Weight of Evidence—County Courts Act, 1875 (38 & 39 *Vict. c.* 50), *s.* 6.

The Court of Appeal from Inferior Courts has no power under 38 & 39 Vict. c. 50, s. 6, to review the decision of the judge of a county court upon a question of fact arising in a suit brought within its jurisdiction as a court of common law.

4 QBD 460
5 CPD 427
428, 430
5 CPD 44-2

THIS action, which was for trespass to the plaintiff's goods and chattels, had been remitted under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 10, to the county court of Westminster, and was there tried by the judge sitting without a jury. Witnesses having been called on both sides, a verdict was found for the plaintiff for 300*l.*

Cyril Dodd now moved for a new trial on the grounds, first, that there was no legal evidence in support of the plaintiff's case; and, secondly, that the verdict was against the weight of evidence. As to the second ground of the motion, he contended that the right of appeal given by 13 & 14 Vict. c. 61, s. 14 (1), had been

(1) By the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14: "If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster."

Sect. 15: "Such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and if they cannot agree, the judge of the county court, upon being applied to by them, or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the Master's office of the court in which the appeal is to be brought."

By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6: "In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted

much enlarged by the County Courts Acts, 1875, s. 6, and that this Court now has power to review the decision of the judge of a county court upon a question of fact in a suit arising within its jurisdiction as a court of common law.

CLEASBY, B. Upon the facts proved in the county court there was some evidence which entitled the judge to find a verdict for the plaintiff; and I am of opinion that we have no jurisdiction to entertain this application for a new trial on the ground that the verdict was against the weight of evidence. The judge of a county court sitting alone has power to decide both law and fact; but by 13 & 14 Vict. c. 61, s. 14, a right of appeal is given to a party "dissatisfied with the determination or direction of the . . . court in point of law or upon the admission or rejection of any evidence." These words exclude an appeal upon the decision of a county court judge as to matters of fact. It seems to me that 38 & 39 Vict. c. 50, s. 6, was passed only to give a new mode of procedure in cases where the right of appeal already existed, and that the legislature did not mean to extend that right to cases

on such terms as to costs, security, or stay of proceedings, as to the court to which such motion shall be made shall seem fit. And if the court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers. And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion, and at the hearing of such appeal."

By the County Courts Act, 1865 (28 & 29 Vict. c. 99), a limited jurisdiction in equity is conferred upon county courts, and by s. 18 an appeal is allowed, "if any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence."

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), in certain cases Admiralty jurisdiction is conferred upon county courts, and by s. 26 and the following sections a right of appeal is allowed, which is slightly modified by the County Courts Act, 1875 (38 & 39 Vict. c. 50), ss. 10, 11.

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where at the time of passing the statute it did not exist. I think that the words, "ruling, order, direction, or decision," refer merely to the determination of the judge upon questions of law, and that if it had been intended to confer upon another tribunal power to overrule a verdict found by him, different language would have been used. In my opinion, the machinery in the latter part of s. 6, where the duty is imposed upon the judges of a county court of taking "a note of any question of law," clearly shews that the motion in the superior court is introduced only as a substitute for the proceeding by way of special case. Upon both grounds the rule must be refused. I express no opinion as to the right of appeal from the decision of a county court judge upon matters of fact in equitable or Admiralty suits.

GROVE, J. I am of the same opinion. I cannot think that by 38 & 39 Vict. c. 50, s. 6, the legislature contemplated an extension of the right to appeal in suits arising within what used to be called the common law jurisdiction of county courts. The change would have been great in principle, and if the legislature had intended to introduce it, clear language would have been employed. If an appeal were allowed upon questions of fact, the result would be that either as matter of right, or by leave of the judge of the county court (1), this Court, or even a higher tribunal, might be compelled to determine the proper inference to be drawn from conflicting facts. The object of the legislature in establishing county courts as cheap and expeditious tribunals would be defeated. All that has been done is to create a fresh mode of procedure, and no right to appeal has been conferred in those cases where it did not exist previously. The terms of the 6th section certainly seem to be applicable only to appeals upon questions of law, and I think that if it had been intended to authorize this Court to overrule the verdict of a judge on the ground that it is against the weight of evidence, a similar power would have been conferred over the verdict of a jury; but no jurisdiction to interfere with the finding of a jury is created by s. 6. I, therefore, think that the jurisdiction of this Court in appeals from county courts is confined to questions of law, and that it has no power to

(1) Under the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 13.

entertain objections as to the proper decision upon facts. This rule must be altogether refused. I agree with my Brother Cleasby that our present decision affects only appeals in actions arising within the common law jurisdiction of county courts; the right of appeal in suits within their equitable and Admiralty jurisdiction may or may not extend to matters of fact.

FIELD, J. The matter which has principally been argued is, whether we have power to grant a new trial in an action brought in a county court on the ground that the verdict found by the judge is against the weight of evidence. The question before us is limited to suits arising within the common law jurisdiction. If we were to accede to this application, it would be necessary to consider the whole evidence given at the trial, and we should in effect hold that the County Courts Act, 1875, s. 6, has introduced a great change in the principle upon which the right to appeal had previously rested. Before that statute a limited right of appeal had been established by 13 & 14 Vict. c. 61, s. 14, and the procedure mentioned in s. 15 required a case to be stated; it is quite clear from the very words of s. 14 that the right was confined to questions of law; and if any decision is required to establish this, an authority conclusive upon this Court is to be found in *Sharrock* v. *London and North Western Ry. Co.* (1), where both the Common Pleas Division and the Court of Appeal held that no appeal upon questions of fact is allowed by 13 & 14 Vict. c. 61, s. 14. I cannot think that the County Courts Act, 1875, s. 6, was intended to introduce a more extended power of appeal: it was meant simply to provide a better mode of procedure. Under the old system the parties might be unable to agree upon the facts proper to be stated in the case, and much time might be lost and much expense incurred whilst it was passed backwards and forwards between their solicitors; ultimately it might be necessary to refer the matter to the judge who tried the cause, and justly or unjustly, complaint was sometimes made that he settled the case according to his own opinion as to the rights of the parties, and not according to a strictly impartial view of the matter. By the new procedure this inconvenience is avoided. The words "order"

(1) 1 C. P. D. 70.

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and "decision" in the County Courts Act, 1875, s. 6, taken by themselves might perhaps create a difficulty; but as the appeal by motion is to be "instead of by special case," it is evident that the power to dispute the determination in the county court is confined to those cases where it existed before the passing of this statute.

County courts have now jurisdiction in equitable and Admiralty suits, and appeals may, pursuant to statutory authority, be had from their decisions therein; but whether the power to appeal in these suits extends to matters of fact, I express no opinion.

Rule refused.

Solicitor for defendants: *Edward Lee.*

April 28.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

LE BLANCH *v.* REUTER'S TELEGRAM COMPANY, LIMITED.

3 CPD 491
5 CPD 312
10 QBD 505

Practice—Jurisdiction—Court of Appeal—Court of Appeal from Inferior Courts—Appeal from Judgment upon Demurrer in Mayor's Court, London—Supreme Court of Judicature Act, 1873, *ss.* 18, 45.

The Court of Appeal from Inferior Courts has no jurisdiction to hear and determine questions of law arising upon the records of the Mayor's Court, London; the proper tribunal to entertain them is the Court of Appeal, under the Supreme Court of Judicature Act, 1873, s. 18, subs. 4.

THIS was an action brought in the Mayor's Court, London; and the declaration alleged that the defendants carried on the business of forwarding and transmitting messages by telegraph from London to the colony of Hong Kong, and delivering the same there; that the plaintiff delivered to the defendants a message to be forwarded and transmitted to Hong Kong, and there delivered within a reasonable time for reward paid by the plaintiff to the defendants; yet the defendants neglected for a long and unreasonable time to deliver the message, whereby the plaintiff sustained damage.

The defendants pleaded that they received the message upon condition that neither they nor their agents would be held re-

sponsible in any case for delays or mistakes in the transmission of, nor for the non-delivery of, any telegram from whatever cause arising.

The replication, after setting out the condition verbatim, alleged that the message was transmitted without mistake or delay to Hong Kong, and on its receipt there was written out for delivery, but was not delivered until ten days after such receipt and writing out for delivery; and that the delay in the delivery of the message arose wholly and entirely from the gross negligence of the defendants and their servants.

Demurrer and joinder.

The demurrer was argued in the Mayor's Court, before the Common Serjeant (T. Chambers), upon the 21st of January, 1876, and he, upon the 19th of February, gave judgment for the defendants. Upon the 10th of March, the plaintiff's solicitors gave notice (1) that, pursuant to leave reserved by the Common Serjeant, motion would be made in the Court of Appeal from Inferior Courts to set aside the judgment for the defendants upon the demurrer, and to enter it for the plaintiff, upon the grounds in the notice stated.

Watkin Williams, Q.C. (*H. D. Greene* with him), for the defendants. Before this case is argued upon the merits, it is wished to raise the preliminary objection that the present appeal has not been brought to the proper tribunal. Previously to the coming into operation of the Supreme Court of Judicature Acts, 1873 and 1875, proceedings in error from the Mayor's Court, London, lay to the Court of Exchequer Chamber, under the provisions of the Mayor's Court of London Procedure Act, 1857, s. 4 (2); and *Simp-*

(1) Under the Supreme Court of Judicature Act, 1875, Order LIII., Rules 1, 2, 3.

(2) By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 4, "in all cases of error arising on proceedings in the Mayor's Court, the Exchequer Chamber shall be the court of error for the purposes of this Act."

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 18, "The Court of Appeal established by this Act shall be a superior court of record, and there shall be transferred to, and vested in, such court all jurisdiction and powers of the courts following (that is to say) . . . . (4) all jurisdiction and powers of the Court of Exchequer Chamber."

Sect. 45. "All appeals from petty or quarter sessions, from a county court,

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son v. *Henning* (1) is an authority clearly establishing that error upon a judgment upon a demurrer must have been taken to that court. By the Supreme Court of Judicature Act, 1873, s. 18, subs. 4, "all jurisdiction and powers of the Court of Exchequer Chamber" are transferred to and vested in the Court of Appeal, which consequently has alone jurisdiction to correct defects appearing upon the face of records in the Mayor's Court.

E. H. Pollard (*Charles Russell, Q.C.*, with him), for the plaintiff. It is submitted that the Mayor's Court being an inferior tribunal, this Court alone has power under the Supreme Court of Judicature Act, 1873, s. 45, to determine the present motion. By the Supreme Court of Judicature Act, 1875, Order LVIII., Rules 1 and 2, proceedings in error have been abolished, and appeals have been substituted; as the present motion is in truth an appeal from an inferior court, this Court has jurisdiction to entertain it pursuant to the Supreme Court of Judicature Act, 1873, s. 45.

BRAMWELL, B. We all are of opinion that, sitting as the Court of Appeal from Inferior Courts under s. 45, we have no jurisdiction to hear this motion.

MELLOR, J. It is plain from the enactments cited in the course of the argument that the jurisdiction and powers of the Court of Exchequer Chamber have been transferred to the Court of Appeal, and that error has been abolished, and appeal substituted for it; it follows, therefore, that as the Court of Exchequer Chamber would have had before recent legislation exclusive jurisdiction to

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or from any other inferior court, which might before the passing of this Act have been brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice."

By the Supreme Court of Judicature Act, 1875, Order LVIII., Rule 1, "Bills of exceptions and proceedings in error shall be abolished." Rule 2. "All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way .... The appellant may, by the notice of motion, appeal from the whole or any part of any judgment or order."

(1) Law Rep. 10 Q. B. 406.

entertain by way of error the questions arising upon this record, the Court of Appeal is now the proper tribunal to decide them by way of appeal.

DENMAN, J., concurred.

Judgment for the defendants.

Solicitors for plaintiff: *Argles & Rawlins.*
Solicitors for defendants: *Johnson, Upton, & Budd.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

May 25.

HILL, APPELLANT; HALL, RESPONDENT.

Statutes, Construction of—Repeal by Implication—Later Statute inconsistent with Earlier.

By 3 & 4 Vict. c. 85, s. 6, "all withs and partitions between any chimney or flue . . . . shall be of brick or stone, and at least equal to half a brick in thickness," upon pain of forfeiting a sum of money. A subsequent local statute enacted that in the borough of H. "the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall from time to time be determined or approved by the corporation," and then, if no direction should be given by the corporation as to constructing chimneys, prescribed certain directions different from those contained in 3 & 4 Vict. c. 85, s. 6. The appellant, within the borough of H., built a chimney, which was not in accordance with the provisions of 3 & 4 Vict. c. 85, s. 6, and he was convicted before justices of an offence against that Act:—

Held, that the subsequent local statute had not repealed 3 & 4 Vict. c. 85, s. 6, within the borough of H., and that the conviction was right.

CASE stated by two justices of the peace for the borough of Huddersfield.

An information was preferred by the respondent charging that the appellant, "at the borough of Huddersfield, did unlawfully make, or cause to be made, a certain with or partition of a certain chimney or flue less than half a brick in thickness, to wit, one and a half inches." At the hearing it was admitted that the appellant, who was a master-builder, had built a certain chimney with a partition of stone-slate of the thickness of one and a half inches between the flues, and that he had in that respect contravened the provisions of 3 & 4 Vict. c. 85, s. 6. At the close of the com-

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plainant's case the solicitor for the appellant contended that the provisions of 3 & 4 Vict. c. 85, s. 6, had been impliedly repealed so far as respected the borough of Huddersfield (within the limits of which the chimney complained of was built) by the Huddersfield Improvement Act, 1871, and the bye-laws made thereunder. The justices ordered and adjudged the appellant to forfeit and pay the sum of 10*l.*

The question for the opinion of this Court was whether the justices, upon the above facts, had power to order and adjudge the appellant to pay the sum of 10*l.*, and whether the statute under which such penalty was inflicted had been impliedly repealed.

Manisty, Q.C. (*W. Beresford* with him), for the appellant. The conviction was wrong. The clause in 3 & 4 Vict. c. 85, s. 6 (1), under which the information was framed, was repealed by the Huddersfield Improvement Act, 1871, s. 111, within the limits

(1) 3 & 4 Vict. c. 85, s. 6: "And whereas it is expedient, for the better security from accidents by fire or otherwise, the improved construction of chimneys and flues provided by the said Act (4 & 5 Wm. 4, c. 35, s. 18) be continued," be it enacted "that all withs and partitions between any chimney or flue which at any time after the passing of this Act shall be built or re-built shall be of brick or stone, and at least equal to half a brick in thickness; and every breast-back and with or partition of any chimney or flue hereafter to be built or re-built shall be built of sound materials, and the joints of the work well filled in with good mortar or cement, and rendered or stuccoed within; and also that every chimney or flue hereafter to be built or rebuilt in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall in every section of the same be not less than fourteen inches by nine inches; and no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of one hundred and twenty degrees, except as hereinafter excepted, and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture, by every master-builder or other master-workman who shall make or cause to be made such chimney or flue, of any sum of not less than 10*l.* nor exceeding 50*l*: Provided, nevertheless, that notwithstanding this Act, chimneys or flues may be built at angles with each other of ninety degrees and more, such chimneys or flues having therein proper doors or openings not less than six inches square."

The Huddersfield Improvement Act, 1871 (34 & 35 Vict. c. cli.), s. 111: "The chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall from time to time be determined or approved by the corporation. Unless otherwise prescribed or ordered, every chimney or flue shall be constructed of good brickwork or stone-

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of that borough, for the general statute is inconsistent with the local statute; if both Acts are to stand, a master-builder is liable to be fined for a breach of the earlier, although he has done everything required by the later. The provision as to building circular chimneys with earthenware pipes in the Huddersfield Improvement Act, 1871, s. 111, is inconsistent with the provisions of 3 & 4 Vict. c. 85, s. 6, and therefore shews an intention in the legislature to repeal the general Act within the borough of Huddersfield.

J. F. Clerk, for the respondent. The conviction was right. Between 3 & 4 Vict. c. 85, s. 6, and the Huddersfield Improvement Act, 1871, s. 111, there is no repugnance or contrariety, and the earlier enactment is not mentioned in the later, and therefore it has not been repealed by implication: *Middleton* v. *Crofts* (1); *Wynn* v. *Davies and Weever*. (2) The provision in the Huddersfield Improvement Act, 1871, s. 111, as to earthenware pipes, is merely a direction as to the kind of material to be used. [He was then stopped.]

CLEASBY, B. We all are of opinion that it is unnecessary to hear any further argument from the respondent's counsel. The case raises questions of a somewhat unusual character, and no authority precisely in point has been cited before us; but I have come to the conclusion that there is not sufficient repugnancy between the two Acts to enable me to say that the earlier is repealed as to Huddersfield by the later. In Dwarris on Statutes, 2nd ed. pp. 530, 531, it is said: "Every affirmative statute is a

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work and mortar well grouted, and, if circular, must be formed of earthenware pipes of not less than ten inches diameter set in mortar, and if not circular, must be pargetted with mortar, and not less than fourteen inches by twelve inches clear interior measurement. No chimney or flue shall have angles less obtuse than one hundred and twenty degrees, except when proper iron or stone doors or openings are left for cleaning purposes. No timber or woodwork shall be placed within nine inches, or wooden plugs driven nearer than six inches of the inside face of any chimney or flue, and no opening shall be made in any chimneys or flues for any purpose, nor pipe for conveying smoke, heated air, steam, or hot water fixed in any new building, except of the materials and in the manner to be submitted to and specially approved by the corporation."

Section 385 relates to bye-laws to be made under the Act.

The 31st of the bye-laws as to streets and buildings made pursuant to the Huddersfield Improvement Act, 1871, was in the same terms with s. 111.

(1) 2 Atkyns, 650, at p. 675; Cases temp. Hardwicke, 326, at p. 338.

(2) 1 Curt. Eccl. 69, at pp. 79, 80.

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repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter, and the repugnancy such that the two Acts cannot be reconciled." Various instances illustrating the application of this rule are afterwards cited in the book which I have mentioned, and I may also refer to the reasoning in *Foster's Case.* (1) Now I do not perceive any substantial repugnance between the two statutes within the meaning of the authorities to which I have alluded: 3 & 4 Vict. c. 85, s. 6, provides that all withs and partitions between any chimney or flue shall be of brick or stone, and at least equal to half a brick in thickness; the object of the section, as stated in the recital, is security from accidents by fire or otherwise, and the enactment is in effect a mere repetition of the provisions in 4 & 5 Wm. 4, c. 35, s. 18. It therefore had been the general policy of the legislature for many years before 1871 that chimneys should be built in a prescribed manner, in order to lessen the danger from fire; and I cannot think that it was intended to allow in Huddersfield a different mode of constructing chimneys from that which is enjoined in other portions of the United Kingdom. A master-builder is bound to obey the requirements of both statutes within the limits of the borough. The general Act is not mentioned in the local improvement Act, and this, in my opinion, ought to be taken as a strong indication that it was not intended to repeal s. 6 of 3 & 4 Vict. c. 85 within the limits of the borough of Huddersfield.

GROVE, J. I am of the same opinion. It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but then the inconsistency must be so great that they cannot both be to their full extent obeyed. I agree with my Brother Cleasby that it is material to observe the omission in the Huddersfield Improvement Act, 1871, s. 111, to notice 3 & 4 Vict. c. 85, s. 6, and I do not think that in considering a question of this kind we ought to hold that a mere accidental inconsistency between two statutes amounts to a total repeal of the earlier; such a doctrine might be pushed to a mischievous extent. But in the present case I am clearly of opinion

(1) 11 Rep. 56 b.

that those provisions in the Huddersfield Improvement Act, 1871, s. 111, which are material to be considered in the present case, may be read merely as establishing an additional safeguard against fire to those contained in 3 & 4 Vict. c. 85, s. 6. I do not see any repugnancy between them: the provision in the local Act as to building circular chimneys of earthenware may seem at first sight inconsistent with prior legislation; but I do not think that it is really so; it is a provision merely intended to meet the improvement which has taken place in building materials. I am decidedly of opinion that the justices were right, and that this appeal must be dismissed.

FIELD, J. I think that the requirements of 3 & 4 Vict. c. 85, s. 6, so far as they are material to the determination of the present case, are still in force in Huddersfield, in spite of the passing of the Improvement Act. Affirmative Acts only repeal one another when a repugnancy clearly exists between them. This rule may sometimes be difficult of application; but in my opinion we are justified in holding that the intention of the legislature was simply to confer upon Huddersfield additional protection against danger from fire.

Judgment for the respondent. (1)

Solicitors for appellant: *Shum, Crossman, & Crossman, for John Sykes & Son, Huddersfield.*

Solicitors for respondent: *Learoyd & Co., for Learoyd, Learoyd, & Morrison, Huddersfield.*

(1) Another case in which the same parties were respectively appellant and respondent was argued upon the 24th of February before Cleasby, B., and Field, J. The appellant was then convicted on an information which charged that he, at Huddersfield, "did unlawfully make or cause to be made a certain chimney or flue the salient or projecting angle of the same not being rounded off four inches at the least," contrary to the provisions of 3 & 4 Vict. c. 85, s. 6. *Manisty, Q.C.*, was for the appellant, and *J. F. Clerk* for the respondent. Similar questions were raised and similar arguments were urged to those above reported, and *Reg.* v. *Champneys* (Law Rep. 6 C. P. 384) was cited. The Court took time to consider its judgment, and after delivery of the judgments in the case above reported, Cleasby, B., stated that the decision therein would determine the judgment in the case argued on the 24th of February, the principle to be applied in determining the two cases being the same.

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May 27.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

SYMONS *v.* REES.

County Court—Action of Ejectment—Prohibition on ground that Hereditaments of greater annual Value than 20*l.—Effect of Decision by Judge of Superior Court that Cause within Jurisdiction of County Court—Res judicata—County Courts Act,* 1850 (13 *&* 14 *Vict. c.* 61), *s.* 22—*County Courts Act,* 1867 (30 *&* 31 *Vict. c.* 142), *ss.* 11, 14.

The plaintiff having sued in a county court to recover possession of certain hereditaments, the defendant applied by summons to a judge of the High Court of Justice sitting at Chambers for a prohibition, on the ground that the annual value thereof was greater than 20*l.*; the judge dismissed the summons, and the defendant did not appeal from his decision. At the trial of the action the judge of the county court refused to receive evidence from the defendant that the hereditaments were of greater value than 20*l.* a year, and he gave judgment for the plaintiff:—

Held, that the decision of the judge of the county court was right; for by the dismissal of the summons the value of the hereditaments was conclusively ascertained for the purposes of the action, which therefore must be assumed to be within his jurisdiction.

This was a rule to shew cause why the judgment given for the plaintiff in this action by the judge of the county court of Carmarthenshire, holden at Carmarthen on the 18th of February, 1876, should not be set aside, and a new trial had upon the ground that the judge improperly rejected evidence of the value of the premises claimed.

The plaintiff, upon the 10th of November, 1875, commenced an action of ejectment in the above court to recover possession of a room, being part of a dwelling-house, No. 16, St. Catherine Street, and certain other hereditaments, and she, by the particulars of demand, alleged that they all were under the aggregate value of 20*l.* The defendant obtained at chambers a summons to shew cause why a prohibition should not issue (1), which, upon the 24th

(1) By the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 22: "It shall be lawful for any judge of any of Her Majesty's superior Courts of common law at Westminster, as well in term time as in vacation, to hear and determine applications for writs of prohibition directed to the judges of the said county courts, and to make such rules or orders for the issuing of such writs as might have been made by the court, and all such rules or orders so made by any such judge shall have the same force and effect as rules of court for

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of January, 1876, was heard by Archibald, J., sitting at chambers; it was contended, for the defendant, that the annual value of the hereditaments sought to be recovered in the above action was above 20*l.*; but his lordship held, upon the affidavits before him, that the annual value was less than 20*l.*, and dismissed the summons.

On the 18th of February the cause came on for hearing in the county court, when the defendant's solicitor objected that the judge had no jurisdiction to determine it, on the ground that the yearly value of the hereditaments sought to be recovered was greater than 20*l.* a year; but his honour held that as that question was raised upon the application for the prohibition, he was bound to entertain the plaint, and was not at liberty to go into the objection; he therefore rejected evidence adduced and proposed to be adduced, upon behalf of the defendant, for the purpose of shewing that the hereditaments were worth more than 20*l.* a year, and he gave judgment for the plaintiff.

B. T. Williams, Q.C., shewed cause. The decision at chambers of Archibald, J., as to the value of the hereditaments was conclusive between the parties, and the plaintiff was entitled, as matter of right, to have the judgment of the county court entered for her.

Ambrose, Q.C., and *W. Graham*, in support of the rule. The decision at chambers did not estop the defendant from shewing the real value; it would be hard upon him that he should be

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such purposes now have, and such writs shall be issued by virtue of such rules or orders as well in term time as in vacation: Provided always, that any rule or order made by any such judge, or any writ issued by virtue thereof, may be discharged or varied, or set aside by the court, on application made thereto by any party dissatisfied with such rule or order."

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 42: "When an application shall be made to a superior Court or a judge thereof for a writ of prohibition to be addressed to a judge of a county court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed."

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 11: "All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements or hereditaments are situate." Sect. 14: "Whenever an action or suit is brought in a county court which the court has no jurisdiction to try, the judge shall order the cause to be struck out."

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deprived of a hearing in open court, because the affidavits used on his behalf at the hearing of the summons for prohibition were insufficient.

CLEASBY, B. We are both of opinion that the judgment of the county court was right. Upon the facts before us, we must take it that the judge at chambers dismissed the summons on the ground that the annual value of the hereditaments was less than 20*l.* The legislature has created a summary mode of proceeding for a prohibition to a county court; but it has allowed an opportunity of appeal to a person dissatisfied with the decision at chambers; and it does not appear that the defendant availed himself of that opportunity. The defendant might have waited until the hearing in the county court, and might then have raised the question as to the value of the hereditaments; instead of so doing, he took the chance of obtaining a decision in his favour by a judge of the High Court of Justice; having made his election, he is bound by the result, so far as concerns the present suit. After the adverse decision at chambers upon the question of value, he could not, at the hearing in the county court, dispute its jurisdiction. The judgment was rightly entered for the plaintiff. I express no opinion as to the effect, in any subsequent action, of the dismissal of the summons for a prohibition.

GROVE, J., concurred.

Rule discharged.

Solicitors for plaintiff: *Helder & Roberts, for Green & Griffiths, Carmarthen.*

Solicitor for defendant: *C. M. Stretton, for T. B. Snead, Llanelly, Carmarthenshire.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

1876
June 1.

SMITH, APPELLANT; BARNHAM, RESPONDENT.

Nuisance—Watercourse "belonging" to River—Artificial Stream—"Wilfully."

14 Geo. 3, c. 96, which was passed for improving the navigation of certain rivers, enacted that "if any person or persons shall wilfully throw any soil . . . . into any part of the said rivers . . . . or of any drains, trenches, or watercourses thereunto belonging, every such person shall for every such offence forfeit" a sum of money.

The appellant was a tanner, having premises on a small natural stream at a point about four miles from one of the rivers, into which it flowed at a place where that river was navigable: in the course of his business he discharged refuse from his works into the natural stream: he was convicted by a stipendiary magistrate of an offence against the foregoing enactment:—

Held, that the words "drains, trenches, or watercourses thereunto belonging" applied only to artificial streams made for the purpose of improving the navigation of the rivers, and did not apply to natural streams, and therefore that the conviction was wrong.

Held, also (per Bramwell, B.), that inasmuch as the appellant discharged the refuse in the course of his business, he did not "wilfully" throw it into the stream within the meaning of the statute.

CASE stated by a stipendiary police magistrate for the borough of Leeds, under 20 & 21 Vict. c. 43.

At a petty sessions holden on the 3rd of March, 1876, an information under s. 97 of 14 Geo. 3, c. 96 (1) was heard, charging

(1) 14 Geo. 3, c. 96 is intituled "An Act to amend an Act passed in the tenth and eleventh years of the reign of King William the Third, intituled 'An Act for the making and keeping navigable the rivers of Aire and Calder in the county of York;' and for improving the navigation of the said river Aire from Weeland to the river Ouze; and for making a navigable canal from the said river Aire, at or near Haddlesey, to the river Ouze, at the Old Brick Garth at Ouze Gate End, within the township of Selby, in the said county; and for other purposes:" it enacts by

Sect. 97. "If any person or persons shall wilfully throw any soil, earth, ballast, gravel, stones, roots, bushes, or other rubbish, into any part of the said rivers, cuts, or canal, or of any drains, trenches, or watercourses thereunto belonging, every such person shall, for every such offence, forfeit any sum not exceeding five pounds nor less than forty shillings, at the discretion of the justice or justices of the peace before whom the offender shall be convicted."

Sect. 103. "All the penalties, fines, and forfeitures hereby inflicted, or authorized to be imposed (the manner of levying and recovery whereof is not otherwise hereby particularly directed),

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that the appellant on the 8th of January in the year aforesaid wilfully and unlawfully did throw a quantity of soil, earth, and rubbish into a beck there situate, called Sheepscar Beck, the said beck being a watercourse belonging to the river Aire in the borough of Leeds.

At the hearing it was proved that the real complainants were undertakers of the Aire and Calder navigation, upon whom statutory powers were conferred by 10 & 11 Wm. 3, c. 19, 14 Geo. 3, c. 96, 1 Geo. 4, c. 39, and 9 Geo. 4, c. 98. The appellant was a tanner, having premises on the Sheepscar Beck (a beck averaging in its course about five feet in width and eighteen inches in depth at the middle of the stream), at a point about four miles from the river Aire, into which it flowed at a place, where that river was navigable and formed part of the navigation authorized by the statute first above referred to. The beck was and had for many years been used by the occupiers of several tanneries and manufactories on its banks. The beck ran under the appellant's premises in a large culvert, through the wall of which thirty-three pipes of about five inches' diameter projected over the stream; and there were also two drains about two feet square from the appellant's premises into the beck. On the day in question the business was being carried on, and out of a five-inch pipe water charged with lime and earthy matter was discharged into the beck, and a sieve having been put under the mouth of the pipe was allowed to remain for about three quarters of an hour, during which time it received and retained about half

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shall, upon proof of the offences respectively, before any justice of the peace for the place wherein the offence shall be committed, or the offender shall be or reside . . . . be levied by distress and sale of the goods and chattels of the party or parties offending . . . . and the moneys arising from such penalties, forfeitures, and fines, when levied, shall be (if not otherwise directed to be applied by this Act) paid, one moiety to the party or parties injured, and the other moiety to the informer."

Sect. 111, after reciting that "the legal estate and interest in the present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging, and the tolls and duties by the said former Act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments," were vested in certain persons, contains provisions for vesting the lands to be purchased under 14 Geo. 3, c. 96, and other provisions of a similar nature.

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a pound of lime and earthy matter, which would otherwise have been passed into the beck; and out of the drain two feet square, water was discharged with earthy and fleshy matter, which during the same time left a residue in a basket of about half a peck in measure of such earthy and fleshy matter, which would otherwise have passed into the beck. The appellant had carried on the same business of a tanner in the same manner at the same premises for less than twenty years.

On the part of the appellant, it was contended that the statute did not apply to the case of a manufacturer who, in the course of his business, turned mere refuse matter from his works held in suspension in water into the beck; that the beck was not such a watercourse as was mentioned in s. 97; that the lime and earthy and fleshy matter discharged into the beck were neither soil, earth, nor rubbish within the meaning of that section, and that they were not wilfully thrown in within its meaning.

It appeared to the magistrate that the object of s. 97 was to keep the rivers mentioned in the Acts and their tributaries free from obstructions, which might be caused by the throwing of soil, earth, or rubbish into them, and that it could make no difference whether such soil, &c., was thrown into them by using the hand or machinery or water as the motive power, or whether it was so thrown out of mere wantonness or for the purpose of getting rid of soil, &c., which having served the purpose of a manufacturer was no longer useful to him. It further appeared to the magistrate that the lime and earthy and fleshy matter discharged into the beck by the appellant were soil, earth, or rubbish. Whether Sheepscar Beck was a watercourse belonging to the Aire within the meaning of s. 97, was a question upon which he entertained some doubt, but he was of opinion that it was such a watercourse. He therefore convicted the appellant, and ordered him to pay a penalty of sixty shillings and the costs.

The question of law arising on the foregoing case was, whether the magistrate was right in convicting the appellant on the aforesaid grounds.

Manisty, Q.C. (*John Forbes* with him), for the appellant. It is

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submitted that Sheepscar Beck cannot be called a "watercourse belonging" to the river Aire at the point where the refuse from the appellant's works flows into it: 14 Geo. 3, c. 96, s. 97, was intended merely to prevent such pollution of the rivers Aire and Calder as might obstruct the navigation thereof. Now the refuse from the appellant's works being discharged at the distance of four miles could not possibly hinder the navigation; moreover the Act merely comprehends artificial watercourses, and Sheepscar Beck is a natural stream. It is further contended that the refuse is not wilfully thrown into the beck within the meaning of the statute: "wilfully" there means "wantonly," or "unnecessarily," whilst the appellant, who carries on a useful trade, discharges refuse into the stream because it is the most convenient mode of getting rid of it.

Shield, for the respondent. The construction suggested on the appellant's behalf would reduce the enactment almost to a nullity, and the clause, being of a remedial nature, ought to receive a liberal interpretation, so as to carry into effect what may be presumed to have been the intention of the legislature, namely, the preservation of the navigable waters from pollution.

BRAMWELL, B. I am of opinion that this conviction ought to be quashed. It is always difficult to construe an enactment so comprehensive in its language as the clause upon which the appellant has been convicted; but I think it clear that he is entitled to our judgment. The penalty is imposed upon a person throwing soil, earth, or rubbish into the rivers, cuts, or canal, or the "drains, trenches, or watercourses thereunto belonging:" now Sheepscar Beck is a tributary of the Aire, and is a natural stream; and for the reasons which I will proceed to give, it does not seem to me to be a "watercourse belonging" to that river in the sense in which that expression is used by the legislature. I think that the words "drains, trenches, or watercourses thereunto belonging" were intended to comprise only those watercourses which are made by the hand of man and artificially connected with the navigation, and, in fact, form a portion of it. Further, it seems to me that s. 103, which gives one moiety of the penalty

when levied "to the party or parties injured," throws light upon the meaning of s. 97, and shews that it is intended only to apply to such acts as are injurious to the undertakers of the navigation. The words "to the injury of the undertakers" are not found in s. 97; but it must be injurious to them to throw into the rivers or canal any of the forbidden things, for they all have a tendency to obstruct the free passage of the water and also of boats passing along it; but it cannot be injurious to the undertakers to discharge refuse from a tannery into a natural stream, which afterwards has to flow four miles before it joins one of the rivers. Moreover, the words "soil, earth, ballast, gravel, stones, roots, bushes," primarily apply to what has been dug or taken out of the ground in order to execute the works necessary to improve the navigation, and they seem to shew that it was merely intended to forbid the throwing back of things which are of the same nature as those which have been removed, and which, when thrown in, must necessarily be injurious to the undertakers by filling up wholly or in part some portion of the navigable stream. The word "rubbish," if it stood alone, might cause a doubt; but in any point of view the words of the clause must be limited, for otherwise throwing in rubbish near the source of the rivers far beyond the limits of the navigation would be an offence punishable under this enactment, and this, we must assume, cannot have been the intention of the legislature. I, therefore, think that as Sheepscar Beck was a natural stream, and as no injury was caused to the undertakers, the appellant was not liable for discharging refuse into it; in my opinion, a person throwing soil, earth, or rubbish into a natural stream flowing into one of the rivers, but at a point beyond the limits of the navigation, is not liable to be convicted under s. 97; but I express no opinion, whether the undertakers may not obtain redress by other remedies against a person who pollutes a watercourse beyond the limits of the navigation, whereby they sustain an injury.

Further, I think that the refuse was not "wilfully" thrown in within the meaning of the clause: for it was discharged in the course of carrying on a lawful trade, and, as it appears, in the exercise of a supposed right; "wilfully" appears to me in this

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section to mean "wantonly" or "causelessly." I, therefore, think that the appellant is entitled to judgment.

I may remark that, in my opinion, if an act is committed contrary to the prohibition of this clause, it is immaterial that it has been done in the same manner and to the same extent for a period of more than twenty years; the person committing it will nevertheless be liable to be convicted.

GROVE, J. I also think that the conviction ought to be quashed; but I base my judgment simply upon the ground that Sheepscar Beck is not a "watercourse belonging" to the river Aire. I think that the section was intended to protect only those streams which are ancillary to the navigation; and upon the facts before us the beck is a tributary and natural stream, and the refuse from the appellant's works flows in at a point far beyond where the navigation begins. Sect. 111 of 14 Geo. 3, c. 96, speaks of "the legal estate and interest in the present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging:" here the word "belonging" is plainly applied to something artificial, and I think it must be understood in the same sense in s. 97. The construction contended for on behalf of the respondent seems to me extravagant, and contrary to the intention of the legislature.

Judgment for the appellant.

Solicitors for appellant: *Torr, Janeway, Tagart, & Co., for Simpson & Burrell, Leeds.*

Solicitors for respondent: *Evans, Foster, & Rutter, for Newstead & Wilson, Leeds.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

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June 1.

BROWN *v.* SHAW.

County Courts—Practice—Appeal—Order giving Leave to appeal made by Judge at Chambers on a Day when this Court sits—County Courts Act 1875 (38 & 39 *Vict. c.* 50), *s.* 6.

A judge of the High Court of Justice, sitting at chambers, has no power to make, on a day when the Court of Appeal from Inferior Courts sits, an order to shew cause why the judgment given in a cause in a county court should not be set aside.

When an appeal from a county court is struck out on the ground that the order giving leave to appeal has been granted by a judge at chambers without jurisdiction, the Court of Appeal from Inferior Courts has no power to grant costs to the party who appears to shew cause against it.

THIS was an action tried in the county court of Middlesex, holden at Clerkenwell, upon the 8th of May, 1876, when judgment was given for the plaintiff.

Upon the 12th of May, Amphlett, B., at chambers, ordered, upon hearing counsel for the defendant and reading the notes of the judge of the county court, that the plaintiff should, on the first day of the next sitting of the Court of Appeal from Inferior Courts, shew cause why the judgment given for the plaintiff on the trial of the action before the judge of the county court should not be set aside and judgment entered for the defendant, on certain grounds in the order specified. On the 12th of May, which fell upon a Friday, the Court of Appeal from Inferior Courts sat and heard motions, and disposed of various cases; it did not sit again until Thursday, the 18th of May.

Aretas Young, for the plaintiff. There is a preliminary objection to the hearing of this case upon the merits. The order to shew cause was made upon a day on which this Court sat, and it is contended for the plaintiff that a judge at chambers has power to act, under the County Courts Act, 1875, s. 6 (1), only when a

(1) By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, "In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order,

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person "aggrieved by the ruling, order, direction, or decision" of the judge of a county court has no opportunity to apply to this Court within the prescribed period of eight days. The present defendant ought to have moved before this Court itself. It is submitted that the order made at chambers is a nullity, and that this Court has no jurisdiction to hear the present appeal.

Francis Turner was called upon by the Court to support the order. It is submitted for the defendant that a judge sitting at chambers has, under the County Courts Act, 1875, s. 6, concurrent jurisdiction with this Court. The defendant might have obtained on Saturday, the 13th of May, Monday, the 15th of May, and Tuesday, the 16th of May, an order which would, without doubt, have been valid; for as the trial took place upon the 8th of May, those days were within the period specified in the statute, and this Court did not sit upon any of them. It would be hard upon the defendant to deprive him of the right to have the case considered before this Court, merely because he was a little premature in applying to a judge at chambers. If, however, this Court is of opinion that the order is invalid, it is submitted that the plaintiff being now represented by counsel, the provision as to the period of eight days may be dispensed with by the Court, and this application by the defendant may now be heard as an original motion. A general power to enlarge the time for doing an act is conferred upon all the Divisions of the High Court of Justice under the Supreme Court of Judicature Act, 1875, Order LVII., Rule 6.

[BRAMWELL, B. That power is not extended to proceedings under the County Courts Act, 1875, s. 6, and the orders and rules of the Supreme Court of Judicature Act, 1875, do not apply to the present case.]

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direction, or decision of the judge at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the Court to which such motion shall be made shall seem fit. And if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers."

At all events a general power is vested in Superior Courts to waive matters of practice when a strict observance of them would work hardship; thus, the Practice Rule, H. T. 1853, No. 50, required a motion for a new trial to be made within a specified time; but where counsel had moved by mistake in a wrong Court, a motion of that kind was entertained after the specified time had elapsed: *Johnson* v. *Warwick* (1); and upon a similar principle this Court, it is submitted, has power to hear this case, although more than eight days have elapsed since the trial in the county court.

[BRAMWELL, B. The Practice Rules, H. T. 1853, were made by the judges, and for the reasons given in Day's Common Law Procedure Acts, 4th ed., p. 413, note, can hardly be deemed to have the force of an Act of Parliament; but I doubt whether, under any circumstances, we have power to enlarge a period of time fixed by a statute for doing an act.]

A direction as to time is only a matter of procedure, and therefore may always be disregarded for good cause shewn.

BRAMWELL, B. I express no opinion whether this Court has or has not power to grant a rule to set aside the judgment of a county court after eight days have elapsed from the trial, when the party applying has by mistake obtained within the eight days an order at chambers; but, at all events, an application of that kind ought to be made upon affidavit shewing how the mistake occurred. But, as matters stand, I am clearly of opinion that the order was wrongly granted at chambers, and that we cannot entertain it. We have no jurisdiction to pronounce any decision.

GROVE, J. I am clearly of opinion, upon the language of the County Courts Act, 1875, s. 6, that a judge at chambers has only power to act when this Court is not sitting; but here the defendant applied at chambers and obtained an order on a day when this Court was sitting: therefore we cannot hear this appeal.

Young applied for costs.

BRAMWELL, B. The plaintiff need not have appeared. As we

(1) 17 C. B. 516.

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have no jurisdiction, it is a matter coram non judice, and I think that we have no power to grant costs. We must take that the plaintiff's counsel has appeared simply as amicus curiæ to point out that we have no jurisdiction.

Appeal struck out; no order as to costs.

Solicitor for plaintiff: *W. G. Morris.*
Solicitor for defendant: *W. F. Stokes.*

Feb. 1, 2.

THE CESENA SULPHUR COMPANY (LIMITED), APPELLANTS, *v.* NICHOLSON, RESPONDENT.

THE CALCUTTA JUTE MILLS COMPANY (LIMITED), APPELLANTS, *v.* NICHOLSON, RESPONDENT.

Income Tax—Joint Stock Company residing in the United Kingdom—Company incorporated and registered in England and earning Profits abroad—5 & 6 Vict. c. 35, s. 40—16 & 17 Vict. c. 34, s. 2, sched. D.

The Cesena Company was incorporated under the Companies Acts, 1862 and 1867, and was afterwards registered for all purposes in Italy. It was founded with the object of carrying on the business of sulphur miners, manufacturers, and merchants in Italy, and, for that purpose, of purchasing certain sulphur mines and plant there. So far as its affairs in the United Kingdom were concerned, the company was managed by a board of directors, who held their meetings at the company's registered office in England. By the articles of association, the working and disposal of the mines and the general business of the company were wholly under the management of the board, subject in certain respects to the control of general meetings of the shareholders, which were to be held in London. There was an Italian delegation, consisting of two or three members of the board resident in Italy, by whom all the practical management of the company's property and affairs in Italy was carried on. All the operations connected with the manufacture and sale of sulphur were exclusively carried on in Italy, where the company's profits (if any) were earned; and the dividends required for the English shareholders were the only part of its profits sent to the United Kingdom. Of the shares, about one-third were held in England, and the rest in foreign countries.

The Calcutta Company was also incorporated under the Companies Acts of 1862 and 1867, but was not registered elsewhere than in England. It was founded with the object of buying jute mills in Bengal, carrying on the business of manufacturers and dealers in jute and other similar materials, and establishing agencies for the purposes of the company throughout the world. The memorandum of association provided that the company's registered office should be situate in England. In fact, the company had no office or other place of business in the United Kingdom, though for registration it had an address in London at

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the office of one of the directors, and when meetings of the English members of the company were held there it was by his favour. So far as its affairs in the United Kingdom were concerned, the company was managed by a board of directors, who had, under the articles of association, general powers similar to those conferred upon the board of the Cesena Company. The board had power to and did appoint agents and a director who resided in Calcutta and had the entire control of the business in India. The buying of the raw material, the manufacture and sale thereof, and all the operations connected with the company's business, were exclusively carried on in India, where alone the profits (if any) were earned. The company had no property in the United Kingdom, and nothing came into the hands of the English directors except what was sent from India to pay necessary expenses in England, and except such proportion of the profits as was divisible among the shareholders in the United Kingdom. After receiving such proportion the directors called a meeting of the shareholders and declared the amount to be distributed as dividend for the current year. Of the shares, about one-third were held by shareholders in the United Kingdom.

Both companies contended that they were liable to income tax only upon the proportion of profits actually received in the United Kingdom :—

Held, that both companies were "residing in the United Kingdom" within 16 & 17 Vict. c. 34, s. 2, sched. D., and were liable to pay income tax upon the whole of their profits wherever earned.

In each of these cases the respective companies, being dissatisfied with assessments to the income tax made upon them for the year 1874, had appealed to the income tax commissioners for the city of London. The commissioners having in each case confirmed the assessment, were required by the respective companies to state cases under 37 Vict. c. 16, s. 9, for the opinion of this Division, in which the companies were the appellants, and the surveyor of taxes the respondent.

The assessments were made under sched. D. of the Acts 5 & 6 Vict. c. 35, s. 1, and 16 & 17 Vict. c. 34, s. 2. By sched. D. of the latter Act duties are imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains. . . . "

By s. 5 of 16 & 17 Vict. c. 34, the duties thereby imposed are

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directed to be assessed under the regulations of 5 & 6 Vict. c. 35.

By s. 40 of 5 & 6 Vict. c. 35, "all bodies politic, corporate, or collegiate companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with. . . ."

The duties granted by 16 & 17 Vict. c. 34, have been continued at various rates by a series of subsequent Acts. The Act imposing the duty for the year 1874–5 is 37 Vict. c. 16.

Cesena Sulphur Company v. Nicholson.

The case of the Cesena Sulphur Company (Limited) was as follows:—

1. This company was founded for carrying on the trade or business of sulphur miners, manufacturers, or merchants, at Cesena, in the kingdom of Italy.

2. The company was incorporated under the Companies Acts, 1862 and 1867, on the 27th of October, 1871, and was subsequently registered in Italy for all purposes on the 1st of November, 1872.

3. By the articles of association (which formed part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board of eight directors, holding their meetings at the registered office of the company in England. There is an Italian delegation, consisting of two or three members of the board, resident in Italy, by whom all the practical management of the company's properties and affairs is carried on. One of the Italian directors is managing director of the company, and resides at Cesena.

4. All the operations connected with the manufacture and sale of sulphur are wholly and exclusively carried on at Cesena, where the profits of the company (if any) are earned; but the Italian members of the board are in constant correspondence with their co-directors resident in France and in England, who meet at the English registered office, No. 84, King William Street, in the city of London.

5. Transcripts and copies of the company's books of accounts are sent to London, where the register of the shareholders prescribed by English law is kept, but all the original books of

accounts of the company and all its moneys are kept in Italy, the dividends required for the English shareholders being the only part of its profits which are sent to this country. The principal banking accounts of the company are kept at Turin and at Paris, the London banking accounts being kept for the payment of offices and administrative expenses, and of dividends here.

6. The shares of the company are divided between the English and foreign shareholders in the proportion of 8924 held in England to 26,076 held abroad.

The memorandum of asssociation was as follows:—

"1st. The name of the company is The Cesena Sulphur Company (Limited).

"2nd. The registered office of the company is to be in England.

"3rd. The objects for which the company is established are:—

"(A.) The carrying on the trade or business of sulphur miners, manufacturers, or merchants.

"(B.) The purchasing for the purposes of such business, and for the working of the same, from Messrs. John Staniforth, of 29, Prince's Gate, Hyde Park, in the county of Middlesex, Esquire, and Martin Wolfgang Scheyer, of No. 2, Rue Chaussée d'Antin, Paris, in the republic of France, banker, certain mines, beds, and strata of sulphur, situate at Cesena, in the province of Forli, in the kingdom of Italy, including the stock of raw sulphur and sulphuric material now being in and upon the same lands and premises, with all the plant, materials, live and dead stock, implements, contracts, and effects in and about the same, and directly connected with the business of sulphur getting, reducing, smelting, refining, and selling, now carried on therein, and the purchasing, or leasing, and taking concessions of any lands wherever sulphur is likely to be obtained, or the purchase, lease, or concession of which shall be deemed desirable for promoting the business of the company.

"(C.) The acquisition, by purchase, payment of fees, or otherwise, of concession or concessions, or licence or licences, from the government of Italy, or the constituted authority of the province wherein the sulphur mines are situate, which may be necessary to enable the company to work the mines to be purchased by them, and to carry on the trade or business of sulphur miners, manufac-

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turers, or merchants, in the kingdom of Italy, and generally the doing of all that may be incidental, or may conduce to the attainment of this end.

"(D.) The purchasing, leasing, and hiring of land, steamboats, waggons, locomotives, and fixed engines for the transportation of the produce of the mines therefrom, and the construction of tramways, railways, or telegraphic wires in connection with or as means of communication to and from the works and mines belonging to the company, or any of them, and any railway or railways in road or roads existing, or to be formed.

"(E.) The erection and construction of such machinery, works, and buildings, and the purchase or leasing of such lands, goods and commodities as it may be deemed advisable to erect, construct, and purchase for working, extracting, refining, manufacturing and laying sulphur, or otherwise for effectuating the objects of the company.

"(F.) The doing of all such other things as are incidental or conducive to the attainment of the above objects.

"(G.) The selling, leasing, letting, and disposing of any of the lands, mines, and property acquired by the company.

"4th. The liability of the members is limited.

"5th. The capital of the company is 350,000*l.*, divided into 35,000 shares of 10*l.* each."

Then followed the names and addresses of seven subscribers who expressed their desire of being formed into a company, and agreed to take one share each. The addresses of all were in England. The date was the 26th of October, 1871.

Among the 177 articles of association the following were referred to during the argument:—

"The company is formed for the purpose of developing and working the mines of sulphur at Cesena aforesaid, and carrying on the business mentioned or included in the memorandum of association.

"Articles of agreement for the purchase of the sulphur works and estate situate at Cesena, in the province of Forli, in the kingdom of Italy, with all the plant, material, live and dead stock, implements, contracts, and effects in and about the same,

from Messrs. Staniforth and Scheyer, in the memorandum of association mentioned, have been already prepared and executed.

"Art. 2. The 'board' shall mean a meeting of the directors duly called and constituted, or, as the case may be, the directors assembled at a board.

"Art. 3. The business of the company shall include all the business mentioned in the memorandum of association and all incidental matters; and the working of the mines may be commenced as soon as the board shall think fit after the 1st of January, 1872, and whether a part only or the whole of the capital of the company is subscribed.

"Art. 4. The working of the company's mines, the mode of the disposal thereof, and the general business of the company, shall be wholly under the order, direction, and management of the directors, subject only to such control of general meetings as is hereafter provided for.

"Art. 5. The company may undertake any operation or business mentioned or included in the memorandum of association, either singly or in connection with any other firms, corporations, or companies, in England or Italy, upon such terms as the directors may think fit.

"Art. 6. The directors shall have full power to register the company in Italy as a société anonyme, and to do all necessary acts for that purpose.

"Art. 7. The directors may from time to time appoint and send any number not exceeding three of their board to superintend or examine into the working and state of the company's mines and business at Cesena, and to remain there or in that locality for any period of time not exceeding one calendar month, and shall defray out of the funds of the company the travelling and hotel expenses of the director or directors who shall undertake such superintendence or examination. In every such case the director or directors who shall be so sent shall make a written report of their proceedings, and of the state of the company's mines, their produce and prospects, with such remarks and suggestions in relation to the business of the company as they shall consider proper."

"Art. 9. No person except the directors shall have any authority to make, accept, or indorse any promissory note or bill of ex-

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change on behalf of the company, or otherwise to pledge the credit of the company.

"Art. 10. No person, except the directors and persons thereunto expressly authorized by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to enter into any contract or engagement, so as to impose thereby any liability on the company.

"Art. 11. The board shall not make, accept, or indorse any promissory note or bill of exchange on behalf of the company, except, in every case, in the ordinary course of the business of the company or in pursuance of a resolution of the board, declaring it to be, in the opinion of the board, necessary for the interests of the company so to do.

"Art. 12. All moneys payable to the company shall be received by the directors or the bankers, or by some person authorized by a board, and shall be paid to the account of the company with the bankers."

"Art. 14. The office shall be at such place in London as the board shall from time to time appoint."

"Art. 16. The London Joint Stock Bank shall be the first and present bankers."

"Art. 35. The first annual general meeting shall be held at such time, not being more than four months after the incorporation of the company, as the directors shall appoint; and a general meeting of the company shall be held once at least in every year.

"Art. 36. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

"Art. 37. An ordinary meeting shall be held yearly at such place in London, at such hour, and on such day, as the directors from time to time appoint."

"Art. 41. Every general meeting shall be held at such convenient place in London as the directors or the shareholders calling the meeting appoint."

"Art. 47. The chairman, with the consent of the meeting, may adjourn any general meeting from time to time, and from place to place."

The commissioners were of opinion that the company is, by virtue of ss. 40 and 192 of 5 & 6 Vict. c. 35, in the same position as a person residing in the United Kingdom, and liable under 5 & 6 Vict. c. 35, s. 1, and 16 & 17 Vict. c. 34, s. 2, to make a return of the whole of the profits of any trade, whether the same shall be carried on in the United Kingdom or elsewhere; and that 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 10, referred to by the appellants, do not bear upon the question at issue, those enactments applying only to agents or other persons entrusted with the payment of dividends or other annual payments payable out of or in respect of stocks, funds, or shares of any foreign company, society, or concern.

The assessment was accordingly confirmed upon the whole of the profits of the company for the year 1874, viz. 5834*l.*

The question for the opinion of the Court is, whether the company is liable to make a return in respect of all the annual profits wholly made by its business in Italy, and is chargeable to income tax thereon; or whether, as was contended on the part of the company, the London directors are only to make a return and to pay income tax in respect of so much of the profits made abroad as is remitted to this country for distribution among the shareholders residing in the United Kingdom.

Sir H. James, Q.C. (*R. S. Wright* and *R. T. Reid* with him), for the appellants. The onus lies on the Crown to make out that the company is a "person residing within the United Kingdom," within 16 & 17 Vict. c. 34, s. 2, sched. D. Strictly speaking, a corporation does not "reside" anywhere, but if some sort of residence is to be attributed to it, the residence is where the real operative business is carried on which earns the profits. It is the profits only which are taxable, and the residence must therefore be assigned with reference to them. No profits are earned, no trading is carried on, and no property exists within the United Kingdom. They are all in Italy. No money comes to England except the proportion for English expenses and dividends to English shareholders. It is no answer to say that the registered office is in England. The company was also registered in Italy. There is a close analogy between the present case and that of *Keyn-*

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sham Blue Lias Co. v. *Baker.* (1) There the company had a registered office in London, where the directors met and managed the business as here. The quarrying and manufacture and sale of cement, &c., was all done at Keynsham. It was held that the company dwelt and carried on its business (within the County Court Act, 9 & 10 Vict. c. 95, s. 128) at Keynsham, and not in London. The decisions upon railway companies were reviewed in that case and held inapplicable, and this authority is sufficient for the determination of the present case. *Kilkenny and Great Southern and Western Ry. Co.* v. *Feilden* (2) points in the same direction, and both the decision and dicta in *Attorney General* v. *Alexander* (3) upon the Imperial Ottoman Bank are in favour of the appellants. It is contrary to the principle of taxation and to natural justice that shareholders who do not reside in the United Kingdom, and have no connection with it, should be taxed in respect of profits which are not earned within the United Kingdom.

Sir J. Holker, A.G., and *Pinder*, for the respondent. There is no more hardship in taxing a company than an individual, and it cannot be denied that if an individual who lived in England owned these mines in Italy all his profits would be taxable. "Residence" is where the real business is carried on, and the memorandum and articles of association shew that that is in London, where the board of directors and the shareholders meet. The series of cases where it was held that railway companies dwell or carry on their business within the County Court Acts at their head office in London, and not at the country stations where contracts are made, are in favour of this contention: *Taylor* v. *Crowland Gas Co.* (4), *Adams* v. *Great Western Ry. Co.* (5), *Shiels* v. *Great Northern Ry. Co.* (6), and *Brown* v. *London and North Western Ry. Co.* (7) A still stronger case to the same effect is *Aberystwith Promenade Pier Co.* v. *Cooper.* (8) The decision in *Attorney General* v. *Alexander* (3) is in favour of the Crown in the present case. There the counsel for the Imperial Ottoman

9 Jur. N.S. 1346.

(1) 2 H. & C. 729; 33 L. J. (Ex.) 41.
(2) 6 Ex. 81; 20 L. J. (Ex.) 141.
(3) Law Rep. 10 Ex. 20.
(4) 11 Ex. 1; 24 L. J. (Ex.) 233.
(5) 6 H. & N. 404; 30 L. J. (Ex.) 124.
(6) 30 L. J. (Q.B.) 331. 7 Jur. N.S. 681.
(7) 4 B. & S. 326; 32 L. J. (Q.B.) 318.
(8) 35 L. J. (Q.B.) 44. 12 Jur. N.S. 99.

(4 & 1 Jur. N.S. 358.

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Bank cited *Ohio and Mississippi Ry. Co.* v. *Wheeler* (1), and other American decisions, to shew that though a corporation may be recognised in other countries, its seat and residence can only be in the country where it is created and constituted. That argument was successful then, and if it be sound it is conclusive of the present case, for the Cesena Company was created and constituted in England, and by virtue of English law alone. It may be that a corporation can have two places of residence, and that this company resides in Italy, but if so, the other residence is certainly in England, and that brings it within sched. D. The other enactments relied on by the appellants, viz. 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 10, do not bear upon the present case.

R. S. Wright replied.

[THE COURT (Kelly, C.B., and Huddleston, B.), deferred judgment until the following case had been argued.]

CALCUTTA JUTE MILLS COMPANY v. NICHOLSON.

The case of the Calcutta Jute Mills Company (Limited) was as follows:—

1. The company was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills at Ishera, near Calcutta, in India, belonging to and then carried on by a firm of merchants, Messrs. Borradaile, Schiller, & Co., resident there.

2. The company was incorporated under the Companies Acts, 1862 and 1867, on the 16th of April, 1872.

3. By the articles of association (which formed part of the case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board, consisting of not less than five directors. The directors have, inter alia, power to appoint one or more persons resident in Calcutta as "the Calcutta directors." As a matter of fact there is at the present time one Calcutta director, Mr. George Muirhead Struthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller, & Co., of Calcutta.

4. On or about the 1st of May, 1872, the company commenced

(1 1 Black. U. S. Rep. 286.

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business as spinners and manufacturers of jute at Ishera, and not elsewhere.

5. The buying of the raw material and the manufacture and sale of the same, as well as all the operations connected with the business of the company in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned.

6. At the time of the purchase of the mills the company adopted an agreement, whereby Messrs. Borradaile, Schiller, & Co., of Calcutta, were constituted their managing agents in India, and they have had the entire control of its business and works at Ishera. At the same time they guarantee the solvency of those with whom they deal, and receive a del credere commission from the company in return.

7. There is an Indian as well as an English share register.

8. On the 31st day of December, 1874, the share register stood as follows: 3843 shares, representing a capital of 76,860*l.*, were held in India, and entered on the Indian share register, while only 2157 shares, representing a capital of 43,140*l.*, were held by persons residing in this country, and entered on the English share register.

9. The company has no office or other place of business in the United Kingdom, although, for the purpose of registration, its address here is, No. 4, St. Helen's Place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there, it is entirely by his favour.

10. All the company's books of accounts, papers, and other documents, as well as its moneys, are kept, received, and dealt with by the management in India.

11. As a matter of fact the company has no property whatever in this country. Nothing comes into the hands of the English directors except what is remitted from Calcutta from time to time to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend passes through their hands.

12. After receiving such proportion of the profits as is mentioned in paragraph 11, all that then takes place in England is, that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the then current year.

13. For the year 1874 the sums received by the directors in this country as the proportion of the profits wholly made and acquired by the business of the company in India, and payable to the shareholders in the United Kingdom, amounted to 8497*l.*

14. The secretary of the company duly made a return of that amount to the commissioners, and stated that it included "the whole amount of the dividends or profits paid or payable to shareholders residing in the United Kingdom for one whole year, on a fair computation or average from the commencement of the business of the company, on the 1st of May, 1872, but not the dividends or profits paid or payable to shareholders resident in the East Indies, and whose names are entered on the company's Indian share register."

The memorandum of association was as follows:—

"1. The name of the company is The Calcutta Jute Mills Company (Limited).

"2. The registered office of the company will be situate in England.

"3. The objects for which the company is established are:—

"(*a*) The purchasing of the jute mills, land, business, works, machinery, plant and stock-in-trade of the Ishera Jute Mills, Bengal, with all the rights, privileges and appurtenances thereto belonging; the carrying on there of the trade or business of buying, selling and manufacturing jute in all its branches, and the extending of the said business and works, or either of them.

"(*b*) The carrying on in all branches of the trades or businesses of dealers in jute and other similar materials, including their purchase, preparation, pressing, cleansing, manufacturing, dyeing, spinning, weaving or otherwise operating upon them, and the sale or other disposal of the same, or the products thereof respectively; and the carrying on of any trades or businesses of a like nature, or in any manner incident to or connected with any of the trades or businesses aforesaid.

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"(*c*) The purchasing or otherwise acquiring of any total or partial or contingent interest in, or the taking out in Great Britain, British India or elsewhere, and the working of letters patent for inventions which may be conducive to the advancement of the businesses aforesaid, or may be considered desirable for the interests of the company, and the granting of licences for the using or selling and disposing of such patents or patent rights respectively.

"(*d*) The establishing and regulating of agencies for the purposes of the company, whether in the United Kingdom, British India or elsewhere.

"(*e*) The amalgamating the company's enterprise or business in whole or in part with that of any other company, corporation, firm or individual engaged in the same or any similar businesses, or having any of the same objects as this company, either by way of sale or transfer of this company's business, goodwill, property, assets and rights, or by way of purchase of the business, goodwill, property, assets and rights of such other company, corporation, firm, or individual, or any part thereof, or any interest therein.

"(*f*) And the doing all such other things as are incidental or conducive to the attainment of the above objects.

"4. The liability of the members is limited.

"5. The capital of the company is 100,000*l*., divided into 5000 shares of 20*l*. each."

Then followed the names and addresses of seven subscribers who expressed their desire of being formed into a company, and agreed to take one share each. The addresses were all in England. The date was the 15th of April, 1872.

Among the 121 articles of association the following were referred to during the argument:—

Art. 3 empowered the directors, with the sanction of a resolution of the company previously given in general meeting, to increase its capital by the issue of new shares, generally upon such terms as the general meeting might direct, or in default of such direction as the directors might think expedient. The company might also by special resolution reduce its capital.

Art. 5 empowered the directors to allot and issue shares in

the capital of the company to such persons upon such terms, and at such times, as they might think fit; and any shares which might be allotted as payment or part payment for property transferred, goods or machinery supplied, or for services rendered to the company, might be issued as and deemed to be fully paid-up shares.

Art. 37. One general meeting, at least, shall be held in every year at such time and place as the directors may determine.

Art. 49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place.

By Art. 75, the business of the company was to be managed by or under the supervision of the directors.

By Art. 76, the directors had power to borrow money on the security of the property of the company, or otherwise, and to draw, accept, and give bills of exchange, and promissory notes, on behalf and for the purposes of the company.

Art. 78. The directors shall have power to appoint Messrs. Borradaile, Schiller, & Co., or such other firm, person, or corporation as they may think fit, the company's agents in British India, or elsewhere, for the purpose of carrying on the business of the company or any of them, or any part thereof, and from time to time to revoke such appointment. They may delegate to such agents or agent all or any of the powers hereby made exerciseable by them, and they shall have power to fix the remuneration of such agents or agent, which remuneration, in case such agents, or any of them, shall be members or a member of their own body, shall be irrespective of the remuneration provided for the directors under these articles. They shall also have power to appoint and remove the secretary, solicitors, bankers, and other officers of the company, and fix their remuneration respectively.

Art. 94. The directors shall have power to appoint one or more persons resident in Calcutta, to be called "The Calcutta Directors." The person or persons so to be appointed need not of necessity be shareholders. The powers of such person or persons, and their terms of office, and all matters connected therewith, shall be settled by the directors.

The question for the opinion of the Court is, whether (as the commissioners held) the company is bound to make a return

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in respect of all annual profits wholly made by its business in India, including the portion paid there to the Indian shareholders, and is chargeable to income tax thereon; or whether, as was contended on the part of the company, the London directors are bound only to make a return and pay income tax in respect of so much of the profits made abroad as actually pass through their hands for distribution among the shareholders residing in the United Kingdom.

H. Matthews, Q.C. (*Rolland* with him), for the appellants. The arguments employed on behalf of the Cesena Company are equally true of the Calcutta Company, and there is one distinction in favour of the latter, viz. that it has "no office or other place of business in the United Kingdom." The American decisions which were cited in *Attorney General* v. *Alexander* (1) have not been followed in England. Here the test of residence, at least for fiscal purposes, is not where is the company incorporated, but where is the real trading carried on? And in America it has been held—*Bank of United States* v. *Mackenzie* (2)—that a corporation created in the state of Philadelphia resided for certain purposes in the state of Virginia, the distinction being that the incorporation was by virtue of an Act of Congress, and not of a particular state. In *Newby* v. *Colt's Patent Fire Arms Manufacturing Co.* (3) it was held that a foreign corporation not incorporated according to English law could be sued here, and the ground of the decision is stated in the judgment of the Court delivered by Blackburn, J.: "The American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there." The judgment also cites with approval the opinion of Lord St. Leonards in *Carron Iron Co.* v. *Maclaren* (4) that the Scotch corporation was resident in England. See also *Oldham Building and Manufacturing Co.* v. *Heale.* (5) The English law as to residence recognises no presumption de jure in favour of the country where a corporation is originated and incorporated. The Income Tax Acts were passed before the Joint Stock Companies Acts, and have no reference to Joint Stock Companies, which are the creation of statutes, and, as pointed out by Lindley on Partnership (3rd ed.),

(1) Law Rep. 10 Ex. at p. 28.
(2) 2 Brock. Rep. 393.
(3) Law Rep. 7 Q. B. 293, 296.
(4) 5 H. L. C. at p. 459.
(5) 3 H. & C. 132; 33 L. J. (Ex.) 236.

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vol. i., p. 6, are "associations unknown to the common law." The Crown relies on the fact that the general meetings are held in London. But by the 37th article of association they may be held anywhere, "at such time and place as the directors may determine." Stress is also laid on the extensive powers possessed by the directors, but by Art. 78 they may appoint agents in India, "and delegate to such agents all or any of the powers hereby made exerciseable by them." Thus the whole management and administration of the company, as well as the trading, might, by its constitution, be transacted in India. It is clear from the case that the Indian director alone determines what the dividends shall be, and no operation takes place in England except the receipt and distribution of the one-third which is divisible among the English shareholders. But assuming in favour of the Crown that the company resides in England, still the profits received in England by the English shareholders are alone taxable. *Sulley* v. *Attorney General* (1) is a conclusive authority on this point. There can be no question that this would be so if the shareholders were not incorporated; and the incorporation can make no difference in principle. The company is, in fact, a partnership, of which, as in *Sulley* v. *Attorney General* (1), some members reside in England and some in a foreign country. Such a case is expressly provided for by 5 & 6 Vict. c. 80, s. 2, and by 16 & 17 Vict. c. 34, s. 10, which require persons in the United Kingdom entrusted with dividends from a foreign company for payment to any person in the United Kingdom to do all acts necessary for paying the duties "on such dividends." They are not required to make a return or pay upon any dividends other than those they receive in the United Kingdom. The same inference is to be drawn from the precise directions given to treasurers or clerks of companies by 5 & 6 Vict. c. 35, ss. 44, 54.

Sir J. Holker, *A.G.*, and *Pinder*, for the respondent, were not heard.

KELLY, C.B. I think the Crown is entitled to our judgment in both cases. I will first deal with the case of *Calcutta Jute Mills Co.*, which has been admirably argued by Mr. Matthews on

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(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.

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behalf of the company. The question is, whether this company can be held liable to the income tax upon the entirety of its profits. It is a company incorporated in England, under the laws of England, by virtue of the Joint Stock Companies Acts, and therefore its first origin and existence are in England alone. The statements in paragraphs 3 and 9 of the case are important. [His Lordship read them.] Now, it signifies little whether the office in which the very important business of holding meetings at which everything that is or may be done by the company is determined, is an office rented from any other person in the city, or whether it is a place lent for that purpose by one of the directors for the use of the company, and at the disposition of the company. Here, then, is their location—their residence, if I am to apply the terms of the statute —here the directors meet when they have occasion, and the company meets, that is, the great body of the shareholders, or such as choose to attend, hold their general and their special meetings. Here the company transacts its business, and exercises the extensive powers with which it is invested by Act of Parliament. For when we look at the constitution of the company, as appears from the case, and from the articles of association, we find that the company is entirely under the actual control of the governing body, that is, the directors in England. It is true (as appears from paragraph 3 of the case) that the directors have (inter alia) power to appoint one or more persons resident in Calcutta as "the Calcutta directors," and that in fact there is one Calcutta director. It is not that there exists by virtue of the constitution of the company a director having power himself to act and conduct the affairs of the company in India; but it is that the governing body, the directors in England, have power to appoint one or more persons, and have appointed one to be the resident director and manager, the governor, as it were, of the company in India. It is he who directs and controls the whole conduct of the business in India, but he is merely the appointee and agent of the directors in England.

Then we find (from paragraphs 5 and 11) that all the buying, selling, and manufacturing, and the whole of the property in which the capital of the company is invested, are in India alone. It is convenient here to refer to what must be the basis of our deci-

sion, namely, the words of the statute. By 16 & 17 Vict. c. 34, s. 2, sched. D., the duty is imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, by the operation of s. 5 of the same statute, and of 5 & 6 Vict. c. 35, s. 40, for the word "person" may be substituted "corporation" or "joint stock company." The clause in sched. D. will then read thus: "any joint stock company residing in the United Kingdom." A great deal was said as to how a "person" might be assessed if entitled in his own right to property such as this company possesses, but to attempt to enter into all the cases in which a tax may well be imposed upon a single individual, and to apply them to a joint stock company, only leads to complication and confusion; and I consider the clause as if the words "joint stock company" were used instead of the word "person." Then arises the question, What is the meaning of the word "residing," as applied to a joint stock company, and to this case? The answer is—whether there may or may not be more than one place at which the same joint stock company can reside, I express no opinion at present—a joint stock company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it, are held, and where its governing body meets in bodily presence for the purposes of the company, and exercises the powers conferred upon it by statute and by the articles of association. That acts of the highest importance, affecting the well-being of the company, the operation of its business, the realizing and disposing of its funds, are done in India, is perfectly true; but they are all done by mere agents—whether they be directors or not—appointed under the sole authority of the governing body in this country. If a company can be said to reside anywhere—and we must suppose that it can, in order to give any effect to the statute as applied to joint stock companies—this company undoubtedly resides at the office in St. Helen's Place, where the meetings are held.

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I need not go into all the decisions which have been cited. In *Sulley* v. *Attorney General* (1) a firm consisting of several partners carried on an extensive business in New York. One partner resided in Nottingham, where he represented the firm, and purchased goods which were sent to America for resale there. All the rest of the business was transacted in New York, where alone the profits were made. It was held that the firm were not liable to be assessed to income tax upon their whole profits in his person by reason of his carrying on a portion of the business in England, because the real place of business, at which alone the great bulk of the business was carried on, was in New York. In other cases under the County Court Acts the question arose, where do the great railway companies "dwell" or "carry on their business?" Every one who knows how the affairs are managed would say that the Great Western Railway Company resides at Paddington, and the London and North Western Railway Company at Euston, because there is the principal seat of business of the company; there the directors meet and exercise their powers, there the books are kept, and from there the great lines emanate. There is no shadow of authority to shew that a place in which the governing body, the directors, meet, and where the shareholders at large hold their general and special meetings and exercise their power of transacting the business, is not the principal seat of business, and the place at which, in the language of the statute, the company may be said to reside. Upon these principles I am clearly of opinion that this company resides at St. Helen's Place.

But the appellants say that the whole business of the company is transacted in India alone, and they rely upon the 11th paragraph of the case which I have already read. All that is true, but every act done, the working of the mills, the realizing of the profits, the transmission of the proportion of the profits in question to England, and the distribution of the rest of the profits in the form of dividends to the different shareholders—all that, if not done by the company directly in India, is done by them indirectly, because it is done by the person appointed by them, whom they may recall at their pleasure, and who has no authority to interfere in any way in the affairs of the company except the authority

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.

conferred upon him by the governing body at home. Then comes paragraph 12 [which his lordship read], and then a statement from which it appears that out of 25,000*l.*, the amount of the whole profits gained by the company for the year in question, about one third only was payable to the shareholders in the United Kingdom. Now it is true that all that the directors actually do in England with respect to the dividend is that, having received a certain proportion of the profits, about one third, they apportion it among the shareholders in the United Kingdom, paying to each that to which he is entitled. If the governing body in England were to learn any day by telegram that 25,000*l.* net profits were in the hands of their representative in India, to be distributed in dividends—whether with or without any deduction for a reserve fund is immaterial—they might by telegram direct that sum to be remitted to England. If it was improperly withheld by a banker, or any one into whose hands it had been paid, they might recover it in an action against him. In contemplation of law the money is theirs, and if they choose they clearly have the power to order the acting director in India to remit the two-thirds in question to England, for them to remit it back to India to him to distribute to the Indian shareholders, and it is only because that proceeding would be expensive, useless and hazardous, that it is not done.

I need not refer to any other statements in the case. Though the whole property and produce of the property is in India, and the whole capital is invested in India, and though the whole of the money which the company is ever entitled to receive, whether as profits or in any other shape, is earned in India, yet it all belongs to the company, who might at any moment virtually take possession of it. If, without their consent, anyone were to take possession of one of the jute mills, the company might immediately bring ejectment and recover it. It is the company located in England which can alone deal with, or authorize the dealing with, the property in any way.

When we look at the memorandum and articles of association, there can be no doubt that all this property and these powers and functions belong to the company. The memorandum says, "The registered office of the company will be situate in England." We find that it is situate in England, in St. Helen's Place. "The

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objects for which the company is estatablished are" as follows :— [His lordship read the whole of the memorandum]. Now, who are the purchasers of the mills and other property? Not the director who has been sent to India, not the shareholders resident in India or any number of them, but the company itself here, and we have the direct statement that that purchase is one of the objects of the company. Another of the objects is stated to be the carrying on of the manufacture of jute and other similar materials. Though that must be done chiefly by the hands of labourers in India, yet in contemplation of law it is done by the company. So as to the clause about acquiring letters patent for inventions. From the beginning to the end, from the coming into existence of the company down to its dissolution, everything is to be done by the company alone, which means by the governing body, or by meetings of the shareholders as representing the company. Then we come to this object, "the establishing and regulating of agencies for the purposes of the company, whether in the United Kingdom, British India, or elsewhere." Here is the key to the whole of the proceedings upon which the appellants rely. Their learned counsel contend that all that is done in India is done by a director there, who may do as he pleases, and by certain persons under him. Why, it is under this very clause of the memorandum that the company here has authorized the director to go to India and do the acts in question, that is, establish an agency in his person, and his acts are the acts of the company.

I need not discuss more than one or two of the articles of association. The 3rd article contains one of the most important powers which can be conferred upon the company. It enables the directors, with the sanction of a general meeting, to increase the capital of the company by the issue of new shares. Could that be done, or could any step be taken towards it in India? Clearly not, even by the agent authorized there. It can only be done by the directors. The company having thus come into existence under the Joint Stock Companies Acts, the question arises, how is it to be set going? The 5th article provides that shares may be allotted, and that any which are allotted as payment for property or services may be treated as paid-up shares, and that that shall be done by the directors. Thus the creation of the shares is

entirely the act of the company. Before the shares are allotted they belong to the company, and the company alone may, by such machinery as they think convenient, allot shares to as many people, be they Indians, Englishmen, or of whatever country, as the company may think fit.

The articles further contain provisions for general meetings, and give powers, but always to the company, that is, to the directors, as to the forfeiture of shares, and for a great variety of other purposes. There is also a power to amalgamate the company with some other business, or to sell the whole business of the company. Thus, every power to be exercised touching the property of the company or the carrying on of the business, must be exercised by the governing body, the directors, with or without the authority of a general meeting, the shareholders' meetings all being in England, and the "residence" being locally situate in England. Therefore, although the whole of the manufacture of jute and the realization and disposition of the funds take place in India, yet being wholly done under the authority of the governing body in this country, I can have no doubt that the case comes directly within the meaning of sched. D.: "the annual profits or gains accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere . . . . and from any trade or employment, whether the same shall be respectively carried on in the United Kingdom or elsewhere." There is nothing in any one of the other sections or statutes on which Mr. Matthews relied, or in any of the numerous authorities cited, which interferes with the plain and direct operation of that clause, under which I hold that this company is liable to be assessed in respect of the whole of its annual profits.

It is, no doubt, true, as was urged by the counsel for the company, that one great principle of the law of England is that taxation shall be imposed only upon persons or things actually within this country; whereas this tax is imposed upon the whole earnings of the company, two-thirds of which—except what may be set aside as a reserve fund, which is not in question here—belong to persons not within this country, and not subject to the taxation and the laws of this country. That is undoubtedly an infringement

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upon one of the principles on which taxation is levied by the laws of every country. The answer to that may be—and it is not for me to decide whether it is a sufficient answer—that if a foreigner residing abroad and having no property or interest in or connection with this country, thinks fit to invest his money in this country, and so to obtain the protection of our law to his money, he must take it with the burden belonging to it and pay the tax imposed upon his income.

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I will now deal with the case of the *Cesena Sulphur Company (Limited)*. This company, like the other, is created under the Joint Stock Companies Acts. It began in this way: Two gentlemen, named Staniforth and Scheyer, being possessed of some sulphur mines and plant, and other property at Cesena in Italy, sold the property to a body of persons, seven in number, who were the first subscribers to the company, and through whom the joint stock company was constituted.

It was created at the time of the purchase, coming into existence regularly under the Joint Stock Companies Acts, and like the other company located in England, and having an office in England. And we must again look at the articles of association to see whether they render the company liable to be assessed. We find that "the company is formed for the purpose of developing and working the mines of sulphur at Cesena, and carrying on the business mentioned in the memorandum of association." From the third article we find that the very origin, the first step in the creation of the business, is "the working of the mines as soon as the board shall think fit." [His lordship read the 4th, 5th, 6th, 7th, 9th, 10th, and 11th articles.] Now, though it is a registered company in Italy, that does not in the least impair its power or nature in this country. The general meetings are in England, the location or "residence" is in England, the directors exercise their powers in England, and no proceedings in working the mines, no act of any kind can be done except under the authority and management of the directors in England.

Then comes the very important 12th article, which, if there were no other, would, in my opinion, dispose of this case. [His lordship read it.] When the annual gains in respect of which this assessment is made were received, to whom did that money

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come? It came to the company, it was received by the directors as the governing body of the company, and they alone have the power to dispose of it. Then the 16th article provides that "the office shall be at such place in London as the board shall from time to time appoint." Then follow many clauses with regard to the capital and the disposition of it. No portion of the capital is to be dealt with in any way except under the authority of the company, and in that respect it is identical with the Calcutta Company. It is, indeed, open to the same complaint, and perhaps in a stronger form, because it may be said that the shareholders of the Calcutta Company in India are subjects of the Queen, and that India itself is subject to the legislature of this country, and that that is not true of the Italian shareholders in the Cesena Company. But it is open to the same observation which I made before. If Italian subjects, who may not think their investments safe in Italian companies, become shareholders in a company and receive an income under the protection of the laws of this country, I do not know why they should not be under the obligation of paying the tax. That, however, is a matter of opinion. Here it is quite clear that these gains are the gains of the company. You cannot divide a company, as was suggested by Mr. Matthews, into parts as you can a partnership consisting of several partners. You cannot say that 4000*l.* of this money belongs to the Cesena shareholders, 500*l.* to French shareholders, and 500*l.* only to English shareholders, and say, "Let the company be assessed only in respect of the 500*l.* belonging to the English shareholders." There is no instance of such a thing being attempted. The whole of the gains come into the hands of the company, and have to be divided among the whole of the shareholders. But until they are divided they are the property of the company, and only pass into the hands of the shareholders when the dividends have been declared under the authority of the company, and according to the articles of their constitution. In both of these cases, therefore, our judgment must be for the Crown

HUDDLESTON, B. I am of the same opinion. I own that I had every inclination to yield to the able arguments which were employed by the counsel for the appellants in each case, and it is

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with the greatest reluctance that I have come to a contrary conclusion. The whole question turns on the interpretation of "residence" as applicable to a company. The tax is only imposed upon a "person residing within the United Kingdom," and a corporation for the purpose of paying income tax is a "person." The use of the word "residence" is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives. I adopt Mr. Matthews' suggestion, that 16 & 17 Vict. c. 34, when it speaks of "residing" does not mean an artificial residence. It means an actual residence. Mr. Matthews argues, therefore, that when you deal with a trading corporation it means the place not where the form or shadow of business, but where the real trade and business is carried on, and that definition seems to be almost conceded by all the counsel. There is a German expression applicable to it which is well known to foreign jurists—der Mittelpunkt der Geschäfte; and the French term is "le centre de l'entreprise," the central point of the business.

All the cases cited support that view. In *Keynsham Blue Lias Co.* v. *Baker* (1), the Court held that Keynsham was the place of business, because the substantial business was carried on there, though the registered office was in London. In *Taylor* v. *Crowland Gas Co.* (2), the learned judges thought that a company dwells where it carries on its business. In *Adams* v. *Great Western Ry. Co.* (3) it was held that the place where that company carried on its business was Paddington. So in *Brown* v. *London and North Western Ry. Co.* (4), it was held that the place where that company carried on its business was at Euston, and not at Chester as had been contended. The same rule had been applied in *Shiels* v. *Great Northern Ry. Co.* (5) Then there is a very strong case, *Aberystwith Promenade Pier Co.* v. *Cooper* (6), where it was held

(1) 2 H. & C. 729; 33 L. J. (Ex.) 41.
(2) 11 Ex. 1; 24 L. J. (Ex.) 233.
(3) 6 H. & N. 404; 30 L. J. (Ex.) 124.
(4) 4 B. & S. 326; 32 L. J. (Q.B.) 318.
(5) 30 L. J. (Q.B.) 331.
(6) 35 L. J. (Q.B.) 44.

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that the place of business was in London, although the pier was built in Wales and the tolls were taken there. The decision in *Sulley* v. *Attorney General* (1) was to the same effect. The case of *Kilkenny and Great Southern and Western Ry. Co.* v. *Feilden* (2), which was cited for the appellants, is, I am satisfied, distinguishable. In the last case in this Court, *Attorney General* v. *Alexander* (3), there was no charter of incorporation in England, and two at least of the learned judges—the Lord Chief Baron and my Brother Amphlett—held that Constantinople, where the corporation was incorporated, was the seat of business, the place where the business was carried on.

In the present argument the Attorney General advanced a proposition to which I cannot assent. He suggested that the registration of a company was conclusive of its residence, that if a company was registered in England it must be held to reside in England. I think the answer which was given during the argument is a good one. It is this:—Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others. If you find that a company which is registered in a particular country, acts in that country, has its office and receives dividends in that country, you may say that those facts, coupled with the registration, lead you to the conclusion that its residence is in that country. In *Attorney General* v. *Alexander* (3), Mr. Matthews cited several American authorities to support his argument that a corporation resides only in the country under whose laws it was created and constituted. In the present argument, however, he cited another American case, *Bank of United States* v. *Mackenzie* (4), which shews that there is a distinction between a corporation constituted by an Act of Congress

(1) 5 H. & N. 711; 29 L. J. (Ex.) 464.
(2) 6 Ex. 81; 20 L. J. (Ex.) 141.
(3) Law Rep. 10 Ex. 20.
(4) 2 Brock. Rep. 393.

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and one constituted by a particular state; and he also relied on *Newby* v. *Colt's Patent Fire Arms Manufacturing Co.* (1) But I do not think that the principle of law is really disputed, that the artificial residence which must be assigned to the artificial person called a corporation is the place where the real business is carried on. The difficulty is in applying that principle to the facts of each case. I admit that the onus of proving the residence lies upon the Crown, as my Brother Cleasby said in *Attorney General* v. *Alexander* (2), and if the Crown fails to satisfy the Court that the place of residence is within the area of taxation, the company ought not to be taxed. Then I have to ask myself where was the place where the real and substantial business was carried on—where was le centre de l'entreprise, the central point? Looking at the facts I can only answer that question by saying that in both these cases it was in England. It is not necessary to go at length into the facts which have been minutely examined by my Lord.

Cesena Sulphur Company v. Nicholson.

With regard to the *Cesena Sulphur Co.*, Sir H. James argued that the facts were, in substance, these:—The trading and all the fixed property are in Italy; no goods are ever sent to England; everything is sold in Italy; the majority of the shareholders are in Italy or France; only about one-third are in England; the books are kept in Italy, and the managing director resides in Italy. At first it did seem as if the centre of business was in Italy. But when we look at the memorandum of association, we find that the objects for which the company is established are not only the purchasing of sulphur mines at Cesena, but also the "taking concessions of any lands wherever sulphur is likely to be obtained;" and the "selling, leasing, letting, and disposing of any of the lands, mines, and property acquired by the company;" so that the operations of the company are not confined to Italy. Taking also the articles of association, we find the first statement is that "the company is formed for the purpose of developing and working the mines of sulphur at Cesena, and carrying on the business mentioned or included in the memorandum of association," that is, carrying on the business of a sulphur company wherever sulphur may be found. Then what are the powers to

(1) Law Rep. 7 Q. B. 293. (2) Law Rep. 10 Ex. at p. 32.

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be exercised by the directors at the office in London? The "board" is defined to be "a meeting of the directors duly called and constituted." What is the business? Article 4 says: "The working of the company's mines, the mode of the disposal thereof, and the general business of the company, shall be wholly under the order, direction, and management of the directors, subject only to such control of general meetings as is hereafter provided for." Then the directors have power to register the company in Italy, which they did. Then Art. 14 says: "The office shall be at such place in London as the board shall from time to time appoint." By Art. 16, a London bank is to be "the first and present bankers," though it is true that they also had a banker at Turin and at Paris. The directors have power to create a reserve fund. General meetings, which are described as ordinary or extraordinary, are to be held, some of them to be called by the particular means pointed out, but all are certainly to be held in London. The power of adjourning "from place to place" is, no doubt, given. We also find that the board may in general do everything with reference to the company, and that every minute, when properly recorded and signed in their book, "is to be considered an original proceeding." (1) True, it is nowhere said that the directors must hold their board meetings in London, but it is obvious that the books must be kept at the office, and the office, according to the articles of association, must be in London; and the inference, from the facts found in the case and from the articles of association, is that the directors are to meet in London. It seems, indeed, that almost every act of the company connected with the administrative part of the business is to be done in London. No doubt the manufacturing part was done in Italy, and the company might have found sulphur in another country, and carried on the manufacturing part of the business in that other country, but the administrative part would be carried on at the place from which all the orders flowed, where officers and agents were appointed and recalled, where their powers were granted and revoked, where whatever money was sent was received, and where the dividends were declared and were payable. All these acts were performed in London. I think, therefore,

(1) By Art. 107.

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that the main place of business of the company is in England, and that there is at Cesena merely an agency, as it were, of the principal house, that agency being confined to the manufacture and sale of the sulphur, but under the direction of the principal house.

I now come to the case of the *Calcutta Jute Mills Co.* Mr. Matthews put his argument very strongly and tersely thus: he said the only transaction in England is the receipt of the amount transmitted for English expenses and dividends, the declaration of that amount, and its division among the English shareholders. But when we look at the articles of association and the case we find that from the office, which was lent to the company, would issue all the orders to the managing director in Calcutta. No doubt, until he received orders to the contrary, he would have full power and discretion to do what he liked in Calcutta, but at any moment from this head office they might have revoked his authority or altered any arrangement which he had made connected with the working of the company. The meetings are held in London; the operation of the company in London is not merely to divide the amount sent among the shareholders, but it is to "declare" the amount; and I apprehend that the directors in London would have full power to say: "We do not approve of the system upon which the division has been made, and we shall require a different system for the future." I think, therefore, that in this case also the principal place of business is in London, and that the company is within the provisions of sched. D. of the Income Tax Act.

But, argued Mr. Matthews, assume that the place of business is in England, still the only division of profits is a division of the profits earned by the English shareholders; if this were a partnership, then, on the authority of *Sulley* v. *Attorney General* (1), the English portion of the partnership would be liable to pay only on the profits which they received, and the Indian portion would not be liable to pay at all on theirs. Now, if you could make out this artificial being, a corporation, to be a partnership, and say that every shareholder was a partner, Mr. Matthews' argument would be very forcible, but the answer in my mind—though I am

(1) Law Rep. 10 Ex. 20.

by no means satisfied that it is the true one—is that this is a corporation, and not a partnership.

KELLY, C.B. As this is the first time this question has been raised, I think that, looking at all the circumstances, each party ought to pay their own costs. There will, therefore, in both cases be .

Judgment for the Crown without costs.

Solicitors for the Cesena Sulphur Company: *Nash, Field, & Mathews.*

Solicitor for the Calcutta Jute Mills Company: *Trinder.*

Solicitor for the respondent in both cases: *Solicitor of Inland Revenue.*

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

April 28.

BURY, APPELLANT; CHERRYHOLM, RESPONDENT.

School Board—Bye-laws—Attendance of Child at School—Child employed in Workshop—Workshop Regulation Act, 1867 (30 & 31 *Vict. c.* 146) *s.* 14 *—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.

4 QBD 141

By the Workshop Regulation Act, 1867, s. 14, every child "employed in a workshop shall attend school for at least ten hours in every week." By the Elementary Education Act, 1870, s. 74, every school board may make bye-laws. The school board for B. by its bye-laws directed that the parent of every child should cause him to attend a school during the whole time it should be open for instruction, but that nothing in the bye-laws should have any effect in so far as it might be contrary to anything contained in any Act for regulating the education of children employed in labour. The respondent's child was employed in a workshop at B. and attended a school pursuant to the provisions of the Workshop Regulation Act, 1867, s. 14, but did not attend the school during the whole time that it was open for the instruction of children, as was required by the bye-laws:—

Held, that the bye-laws were not contrary to the Workshop Regulation Act, 1867, and were capable of being enforced, and that the respondent had committed a breach of them.

CASE stated by two justices of the peace for the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

On the 19th of February, 1876, the appellant laid an information, charging that the respondent, being the parent of a certain

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child called John Cherryholm, residing with him and being not less than five nor more than thirteen years of age, did on the 18th of February unlawfully neglect and omit to cause the said child to attend school, as required by the bye-laws (1) of the school board for the district of the borough of Barnsley made and confirmed pursuant to the Elementary Education Act, 1870, without reasonable cause for such non-attendance. At the hearing of the information Benjamin Clegg, school-warden to the board, proved the non-attendance of the child at school on the day named, and that the child was twelve years of age on the 11th of May, 1875.

It was proved on behalf of the respondent that the child was employed in the boot manufactory of C. Rollinson, in Barnsley, and attended school regularly pursuant to the Workshop Regulation Act, 1867 (30 & 31 Vict. c. 146).

On the part of the appellant it was contended that by virtue of the bye-laws of the board, made in pursuance of the 74th section of the Education Act, 1870, the board could, if they thought fit, compel children to attend school full time, notwithstanding that such children were working at a workshop and attending school in conformity with the provisions of the Workshop Regulation Act, 1867; that there was nothing in the Workshop Regulation Act, 1867, restraining the compulsory powers conferred on the board by the Elementary Education Act, 1870, as the former Act merely provided that children should not work except on certain conditions as to time and education; that there was nothing in the bye-laws contrary to anything contained in any Act for regulating the education of children employed in labour, and that the Ele-

(1) The following were the material portions of the bye-laws of the Barnsley School Board :—

1. "The parent of every child residing within the borough of Barnsley shall cause such child, not less than five nor more than thirteen years old, to attend a public elementary school, unless there be reasonable excuse for non-attendance."

2. "The time which children subject to these bye-laws shall attend school shall be the whole time that the school shall be open for the instruction of children of the same sex, age, and class."

3. "Nothing in the present bye-laws shall have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour."

4. "Any parent committing a breach of these bye-laws, or any of them, shall, for each such offence, be subject to a penalty not exceeding, with costs, five shillings."

mentary Education Act, 1870, overrode the Workshop Regulation Act, 1867.

The justices dismissed the information, they being of opinion that, as the child was fulfilling the conditions and provisions of the Workshop Regulation Act, 1867, the school board could not compel him to attend school full time under the bye-laws.

The questions of law for the opinion of this Court were: 1. Were the Barnsley School Board able to enforce their bye-laws against children under thirteen years of age, who, although not obeying such bye-laws, attended school, and otherwise observed the conditions of the Workshop Regulation Act, 1867? 2. Does the Elementary Education Act, 1870, override this and other Acts regulating the education of children employed in labour?

Shield, for the appellant. It is submitted that the bye-laws of the Barnsley School Board are not contrary to the Workshop Regulation Act, 1867, s. 14. (1) That statute simply enacted that

(1) The Workshop Regulation Act, 1867 (30 & 31 Vict. c. 146) is intituled "An Act for regulating the hours of labour for children, young persons, and women employed in workshops; and for other purposes relating thereto;" and enacts by s. 4, "The following words and expressions shall in this Act have the meanings hereby assigned to them . . . 'child' shall mean a child under the age of thirteen years."

Sect. 7: "If any child, young person, or woman is employed in contravention of this Act, the following consequences shall ensue: first, the occupier of the workshop in which such child, young person, or woman is employed shall be liable to a penalty of not more than three pounds; second, the parent of, or the person deriving any direct benefit from the labour of, or having the control over, the child, young person, or woman, shall be liable to a penalty of not more than twenty shillings, unless it appears to the Court before whom the complaint is heard that the offence has been committed without the consent, connivance, or wilful default of the parent or person so benefited or having such control."

Sect. 14: "The following regulations shall be made . . . respecting the education of children employed in workshops: first, every child who is employed in a workshop shall attend school for at least ten hours in every week during the whole of which he is so employed."

Sect. 15: "The parent of every child employed in a workshop shall cause that child to attend school in manner required by this Act. Every parent who wilfully fails to act in conformity with this section shall be liable to a penalty of not more than twenty shillings for each offence."

Sect. 16: "Every occupier of a workshop who has employed a child for any time amounting in the whole to not less than fourteen days shall on Monday in every week during the employment of such child obtain from the principal teacher of some school a certificate that the child so employed has, in manner

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a child should receive education at least during ten hours a week; it is in effect restrictive as to the time during which a child may be employed in a workshop; it is not a statute enabling a parent to employ his child in a workshop, provided the latter attends school for ten hours during each week. If the school board of Barnsley had made a bye-law allowing children to attend school only nine hours during a week, that would, no doubt, have contravened the Workshop Regulation Act, 1867, and would have been void; but nothing prevents the school-board from compelling attendance by a child employed in a workshop for a greater number of hours than ten.

The respondent did not appear.

BRAMWELL, B. I confess that I should have been better pleased if this case had been argued by counsel on behalf of the respondent; but I think the construction of the statutes brought under our notice clear enough to compel us to say that the appellant is entitled to our judgment.

I concur in the argument advanced before us that the Workshop Regulation Act, 1867, is not an enabling statute, that is to say, it does not enable a parent to put his child to labour provided the

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required by this Act, attended school during the preceding week, if attendance at school was so required during that week . . . Every person who acts in contravention of this section shall be liable to a penalty of not more than three pounds."

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74: "Every school board may from time to time, with the approval of the Education Department, make bye-laws for all or any of the following purposes: (1.) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school: (2.) Determining the time during which children are so to attend school . . . (4.) Imposing penalties for the breach of any bye-laws . . . Any proceeding to enforce any bye-law may be taken, and any penalty for the breach of any bye-law may be recovered in a summary manner . . . It shall be lawful for Her Majesty by order in council to sanction the said bye-laws, and thereupon the same shall have effect as if they were enacted in this Act."

Sect. 92: "Any penalty and any money which under this Act is recoverable summarily, and all proceedings under this Act which may be taken in a summary manner, may be recovered and taken before two justices in manner directed by" 11 & 12 Vict. c. 43 and the Acts amending the same.

latter attends school ten hours at least during each week; but it is a restrictive statute, and forbids a child to be set to work, unless he shall receive instruction during that portion of time. Further, the object of that statute was, as its title indicates, the regulation of labour; but the Education Act, 1870, had a different object; it was intended to make thereby better provision for the diffusion of elementary instruction, and where two statutes are inconsistent with each other, the later operates as a repeal, or at least as an alteration of the earlier, and must be taken to be the governing statute, unless an express statement is therein inserted that the former Act shall not be interfered with; therefore the Education Act, 1870, must be assumed to have introduced new provisions for education, unless its language and the words of the bye-laws keep in force the Workshop Regulation Act, 1867. It is to be observed that, by the Elementary Education Act, 1870, s. 74, bye-laws, when sanctioned by an order in council, are to have the same effect as if they were enacted in that statute, and, by the terms of the third of the bye-laws, nothing therein contained shall be of any effect "in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour." The question therefore before us is, whether the bye-laws are contrary to anything contained in the Workshop Regulation Act, 1867. In one sense, it is impossible to say that there is not a difference; for, under that statute, attendance during ten hours a week would be sufficient, whilst under the bye-laws, as appears from the statements contained in the case, attendance during a larger number is requisite. But I think that the statute and the bye-laws may be read together, and are not really in conflict; and the result is, that the School Board for Barnsley may determine the time during which a child employed in a workshop shall attend school, provided the time fixed on is not less than ten hours a week; but a bye-law that a child should attend school during only nine hours in the week would be void, as being against the provisions of the Workshop Regulation Act, 1867. I cannot think that it was intended by the bye-law to lay down, that a child employed in a workshop should receive a less amount of instruction than a child who is not engaged in any occupation. I am of opinion that all children under the age of thirteen must, under the bye-laws, enjoy the

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same opportunities of obtaining education, and that no difference was meant to be created. I am satisfied that the bye-laws are not contrary to the Workshop Regulation Act, 1867, although they may be different from it. This appeal must be allowed.

MELLOR, J. I am of the same opinion. The chief point for our determination is whether the bye-laws are in excess of the powers created by the Elementary Education Act, 1870, s. 74. When we look at the provisions of the Workshop Regulation Act, 1867, we find that it was intended to regulate the hours of employment and other matters connected with workshops; and by s. 7 the occupier of a workshop, as well as a person having the control of those who are protected by the statute, is liable to a penalty for a breach of its enactments. By s. 14 some provision is made for the education of children employed in workshops; and by s. 15 a parent is compellable to cause his child to attend school in the manner required by this Act; but by s. 16 the occupier of a workshop is made liable to obtain certificates that a child employed therein has duly attended school. The Elementary Education Act, 1870, has a much wider operation in providing for the instruction of children: but by s. 74 it is the parents, and the parents only, who are bound to secure the attendance of their children at school. Therefore the scope of the two statutes is different: the earlier was intended to provide primarily for the government of workshops, and only incidentally for the instruction of children employed therein; the later was meant to render compulsory the education of children, whether employed in workshops or not. The bye-laws may have a much more extensive operation in promoting education than the Workshop Regulation Act, 1867, but I do not see any real inconsistency between them. By that statute ten hours' attendance in every week was enough; but the bye-laws declare that it shall not be enough, and, as they do not diminish the number of hours during which attendance was required by 30 & 31 Vict. c. 146, s. 14, they seem to me to be valid. It would be almost absurd to hold that children employed in workshops should receive instruction during one set of hours, and that other children should be educated during a different set; by such a decision we should circumscribe the operations of 33 &

34 Vict. c. 75. I think it very unlikely that such a distinction could have been intended, and I am clearly of opinion that the determination of the justices must be overruled.

DENMAN, J. I regret that the respondent has not been represented by counsel; nevertheless, I think it plain that the appellant is entitled to judgment. I quite agree with the opinions expressed by the other members of the Court. I cannot think that the bye-laws are contrary to the provisions of the Workshop Regulation Act, 1867, s. 14, which merely enacts that a child shall attend ten hours at the least; in my opinion, the view taken by the magistrates does very great violence to the language of the statute; they in effect read the 14th section as if it had contained the words, "every child who is employed in a workshop shall attend school for ten hours in every week and no more." The Act does not prevent a child from attending school for a greater number of hours; it merely fixes what shall be the smallest number necessary to comply with the provisions of the Act. The construction of the justices makes 30 & 31 Vict. c. 146 quite different from what it really is; and I think that this consideration is sufficient to dispose of the case. We may found our judgment upon this ground, and need go no further for reasons to justify our decision.

Judgment for the appellant.

Solicitor for appellant: *S. Corpe, for R. Bury, Barnsley.*

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May 20.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

COLLIER, APPELLANT; WORTH, RESPONDENT.

Statute, Construction of—"Town."

8 Cox Cr. 396.

By a Local Act passed in 1822 it was enacted that no person should sell any fish within the "town" of R. except in the market-places thereof, and that any person offending against this provision should forfeit a sum of money. In 1876 the respondent sold fish in M. Street, which then was a main thoroughfare of the town of R.; but in 1822 its site was green fields: M. Street was not within the market places of R.:—

Held, that the word "town," as used in the Local Act, meant the collection of buildings from time to time called the town of R., and that the respondent had been guilty of an offence against that Act.

CASE stated by three justices of the peace for the borough of Rochdale, under 20 & 21 Vict. c. 43.

At a petty sessions holden on the 22nd of March, 1876, at Rochdale, the appellant appeared in support of a summons issued on an information preferred by him against the respondent, charging that she, on the 4th of March, 1876, "at Molesworth Street, in the said borough, not then and there being in the Old or New Market Place in the said borough, but within the town of Rochdale aforesaid, unlawfully did sell certain fish, to wit four herrings, contrary to the statute in such case made and provided." At the hearing the following facts were proved:

The appellant was the inspector and superintendent of the Rochdale New Market Place, established by 3 Geo. 4, c. lviii. (1)

(1) 3 Geo. 4, c. lviii. was passed in 1822, and is intituled "An Act for providing an additional market place in and for the town of Rochdale, in the county palatine of Lancaster;" the preamble contains the following recitals:—

"Whereas the town or parish of Rochdale, in the county palatine of Lancaster, hath of late years greatly increased in population and buildings, and the present market place, which is held in a certain place in the said town called the Market Place, has become so inadequate, that the passages along the public streets within the said town are greatly obstructed and rendered dangerous to the inhabitants of the said town, and also to travellers, by reason of the number of stalls and standings placed therein: and whereas it would be a great convenience to the inhabitants of the said town, and to persons frequenting the said town on market and other days, and would tend to remove nuisances and obstructions, if

The respondent did, on the 4th of March, 1876, expose for sale and actually sell to Elizabeth Holt in a street in Rochdale, called Molesworth Street, and situate in the present municipal and parliamentary borough of Rochdale, four herrings at the price of twopence. Such sale was made in the open street, from a basket carried by the respondent from door to door, and was not made in the private dwelling house or shop of the respondent. Molesworth Street was not in the Old Market Place or the New Market Place of Rochdale. There was no definition in 3 Geo. 4, c. lviii., of the limits of "the town of Rochdale," nor had any subsequent Act local to Rochdale defined what should be the meaning of the expression "the town of Rochdale," as used in 3 Geo 4, c. lviii., for the purposes of the Act. At the time of passing that Act

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a new or additional market place was provided and established" in a certain part of the town: "And whereas it would be a great convenience to the inhabitants of the said town and to persons resorting thereto, if a town hall or market house with proper and sufficient offices and other works and conveniences were built and erected within and for the said town, and if good and sufficient stalls, standings, and other accommodations were erected, built, and provided within the said additional market place intended to be made and established for the uses and purposes thereof, and if proper regulations were made and established for the good government thereof."

By s. 1 certain persons were empowered to erect a new or additional market-place.

By s. 33 certain streets might be widened "within the space of four years from and after the passing" of the Act.

By s. 42 it was, amongst other provisions, enacted that no person or persons shall "on any market day or days, or any other day, sell or expose to sale, within the said town of Rochdale, except in the said old market place or the said new market place, any meat, butter, poultry, eggs, garden stuff, potatoes, roots, or vegetables, or any fish, at any time within the said town, except as hereinafter mentioned; and if any person or persons shall offend in any of the cases aforesaid, such person or persons so offending shall forfeit and pay, for every such offence, on conviction before one or more justices of the peace for the said county, any sum not exceeding five pounds . . . . Provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to prevent or hinder any person from selling or exposing to sale any marketable commodities, matters, or things whatsoever in his or her own private dwelling house, or in his or her own shop, in any part of the said town of Rochdale."

By s. 55, "Nothing in this Act contained shall extend, or be construed to extend, so as to lessen, diminish, or affect the right of the lord of the manor to hold any fair or fairs within the said town or reputed town of Rochdale."

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Molesworth Street was not made, and the site of it was in fact green fields; Molesworth Street had since become a main thoroughfare, with houses on both sides thereof, in a populous part of the present municipal borough of Rochdale, and there was a continuous line of building from the Rochdale Market Place to Molesworth Street, and such line of building extended beyond the said street to points much further distant from Rochdale Market Place.

It was contended on the part of the appellant that the expression, "the town of Rochdale," used in 3 Geo. 4, c. lviii., must be taken to mean the aggregation of buildings erected at the time of the passing thereof, and of those erected since that time.

It was contended on the part of the respondent that "the town of Rochdale," as used in 3 Geo. 4, c. lviii., had reference only to the aggregation of continuous buildings forming the town of Rochdale at the time of the passing thereof.

The justices were of opinion that the meaning of the expression "the town of Rochdale," as used in 3 Geo. 4, c. lviii., was the aggregation of buildings erected and in existence at the passing thereof, and that Molesworth Street, being then fields unbuilt upon, was not within the town of Rochdale as intended to be defined by that Act. They accordingly dismissed the information.

The question of law for the opinion of this Court was, what was the meaning in the year 1876 of the expression "the town of Rochdale," as used in 3 Geo. 4, c. lviii.

The Court was to make such order as might seem fit.

May 19. *Manisty*, Q.C. (*E. A. Owen* with him), for the appellant. The question in this case depends upon the meaning of the expression "the town of Rochdale," as used in 3 Geo. 4, c. lviii., and it is necessary to determine whether it was intended thereby to comprehend only the buildings then existing, or to include in addition the buildings to be afterwards erected, and, in ordinary language, forming part of the town. In *Reg.* v. *Cottle* (1) it was held that the word "town," as used in a statute, was of elastic meaning, and might include buildings not existing at the time of passing the Act.

(1) 16 Q. B. 412; 20 L. J. (M.C.) 162.

[GROVE, J. That case was really decided upon the supposed inconvenience of having a turnpike gate standing within the limits of a town.]

Reg. v. *Cottle* (1) was approved of and followed in *Commissioners of Milton* v. *Faversham District Highway Board.* (2)

[GROVE, J. The expression "town or reputed town," used in 3 Geo. 4, c. lviii., s. 55, seems to shew, that the legislature intended the Act to apply to whatever collection of buildings from time to time should lie within the limits of Rochdale.

CLEASBY, B. In *Elliott* v. *South Devon Ry. Co.* (3) the judges of the Court of Exchequer appear to have thought that the word "town," as used in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 11, means any collection of houses so near to each other that they may reasonably be said to be continuous; but the facts in that case were so different from those now before us, that I do not think we can deem it an authority for the purposes of the present argument.]

It is submitted that the intention of the legislature will be defeated, unless the words "the town of Rochdale" be read as meaning what is from time to time popularly considered to lie within the limits of Rochdale.

The respondent did not appear.

Cur. adv. vult.

May 20. CLEASBY, B. We are now prepared to dispose of this case, for we have come to the conclusion that the appellant is entitled to our judgment. At one time during the argument I was inclined to think that the justices had taken a correct view of the question of law reserved for our determination; for it appears to follow, from the contention for the appellant, that an offence is committed against the Act if fish or vegetables are sold in a street of Rochdale at a distance of two miles from the market-places; but, in my opinion, we shall be carrying out the object of the legislature by deciding in favour of the appellant. No doubt, in one sense, 3 Geo. 4, c. lviii., was passed with reference to the state of the town as it then stood; but it must be recollected that from its very nature a town is of varying extent, and its limits from time

(1) 16 Q. B. 412; 20 L. J. (M.C.) 162. (2) 10 B. & S. 548, n.
(3) 2 Ex. 725.

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to time will depend upon the number of its inhabitants; and I do not think that in the present case the Act ceased to operate within the limits of Rochdale because since the passing thereof it has grown in size. The preamble of the statute alludes to an increase in population and buildings, and therefore it may be fairly presumed that the legislature intended to provide for a subsequent addition to the number of houses and inhabitants. The authorities cited in the course of the argument are in favour of the view which we take; but without reference to them, I think there was a sale within the town in violation of s. 42. The decision of the justices must be reversed, and the case must be remitted to them with the opinion of this Court that they ought to have convicted the respondent.

GROVE, J. I am of the same opinion. I think it clear, on an examination of the provisions of the statute, that the expression "the town of Rochdale" is not limited to the town as it stood at the time of passing 3 Geo. 4, c. lviii., but means the town for the time being. The preamble alludes to the increase of Rochdale in both population and buildings, and it was intended to provide a new and additional market place, the former market place having become inconvenient and even dangerous to persons passing by; s. 33 provides for widening certain streets, upon condition that the works are executed within a specified time; and then s. 42, under which the information was laid, enacts that goods shall not be sold in the streets. These provisions seem to shew that the legislature had in view the object of providing additional accommodation for holding markets and of rendering the streets safe and convenient for traffic. If the view adopted by the justices were correct, in the middle of all streets built since 1822 goods might be bought and sold, although the traffic might thereby be greatly impeded. I think that the expression "the town of Rochdale" means the collection of buildings so called at any time after the passing of the statute, and that the view taken by the justices was wrong.

Judgment for the appellant.

Solicitors for appellant: *Norris, Allens, & Carter, for H. Brierley, Rochdale.*

[IN THE COURT OF APPEAL.]

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May 16.

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*Inland Revenue—Inhabited House Duty—Dwelling House let in different Tenements—*48 *Geo.* 3, *c.* 55, *sch. B, rules* 6, 14—*Valuation List—Valuation Metropolis Act,* 1869 (32 & 33 *Vict. c.* 67), *ss.* 45, 76.

The Westminster Chambers in the metropolis belong to an association, and consist of seven blocks of building. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance, and each block is in its internal arrangement structurally divided into different tenements or suites of rooms. These suites, like chambers in the Inns of Court, are quite distinct from and have no means of communication with each other, except that each has an open door opening on to the common staircase. The street door is locked at night, and a porter, appointed and removeable by the association, resides in a distinct suite of rooms in the basement of the block, and has a key of and access to each of the suites of rooms for general superintendence, and as the tenant's servant. The Westminster Improvement Act, 1853, enacts that, where any "house" erected on the land in question is to be occupied by different persons in distinct sets of apartments, the association may demise or sell any set separately from the rest of the "house." None of the 117 suites (of which the seven blocks consist) have been sold and some have never been let, but most are let as chambers, offices, or residences, to tenants for a term, at yearly rents, payable quarterly, under written agreements, with provisoes for re-entry in case of non-payment of rent or breach of covenant. The association provide gas for the staircases, halls, and passages, and water for the entire building, and pay rates and taxes, charging the tenants higher rents in consequence. In the valuation list prepared under the Valuation (Metropolis) Act, 1869, each suite of rooms is treated as a separate hereditament, the respective tenants thereof being separately assessed to the poor-rate as the occupiers; and the Court of Queen's Bench, in *Reg.* v. *St. George's Union* (Law Rep. 7 Q. B. 90), decided that for the poor-rate the suites were rightly treated as separate hereditaments:—

Held, affirming the judgment of the Court below, first, that for the purpose of the inhabited house duty, rule 6 of 48 Geo. 3, c. 55, sch. B, applied, and the association must be assessed as occupiers of each block treated as one dwelling-house; and that the respective tenants of the different suites ought not to be assessed as occupiers of distinct properties under rule 14.

Secondly, that the value of each block was properly represented by the aggregate sum of the values appearing in the valuation list, although, owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the association.

THIS was an appeal by the defendants from a judgment of the Court of Exchequer upon a case stated under 22 & 23 Vict. c. 21,

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s. 10, which is set out at length in the report of the case below. (1) For the present purpose it is sufficient to state that the premises in question, the Westminster Chambers, consist of seven blocks of buildings, divided into 117 tenements or suites of apartments in the manner described in the head-note.

The Westminster Improvement Act, 1853 (16 & 17 Vict. c. clxxvi.), applies to the association and the property in question, and s. 69 enacts that "where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors or assigns, may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house." The association hold the Westminster Chambers by title derived from the commissioners, whose assigns they are. None of the suites of rooms have been sold, but the greater number have been demised for seven, fourteen, or twenty-one years.

For the poor rate each of the 117 suites had been treated in the valuation list as a separate rateable hereditament, and the tenants had been separately assessed in respect of each suite, in accordance with the decision in *Reg* v. *St. George's Union*. (2) For the house duty the premises were treated as seven separate inhabited houses, and the assessment now in question was made on the association as occupiers, and not on the tenants whose names appeared in the valuation list. The value upon which the assessment of each block was made was the sum of the values inserted in the valuation list with respect to all the suites in that block.

The inhabited house duty is levied under 14 & 15 Vict. c. 36, of which s. 2 enacts that all duties imposed by the Act shall be assessed and levied according to the regulations contained in 48 Geo. 3, c. 55, sch. B. The material parts of schedule B. are as follows:—

A schedule of the duties made payable on all inhabited dwelling houses throughout Great Britain, according to the value thereof, and of the offices and lands to be charged therewith:—

(1) Law Rep. 10 Ex. 305. (2) Law Rep. 7 Q. B. 90.

Rules for charging the last-mentioned duties:

Rule 1. The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of five pounds or upwards, at the respective rates before mentioned, and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner, in case of a change in the occupation thereof, as is before directed in respect of the duties on windows or lights.

Rule 4. Every chamber or apartment in any of the Inns of Court, or of Chancery, or in any college or hall in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof.

Rule 6. Where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties: Provided that where the landlord shall not reside within the limits of the collector, or the same shall remain unpaid by such landlord for the space of twenty days after the same is due, the duties so charged may be levied on the occupier or occupiers respectively; and such payments shall be deducted and allowed out of the next payment on account of rent.

Rule 7. No dwelling-house or other such premises as aforesaid shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place.

Rule 11. In case any house, with the premises aforesaid therewith occupied, shall not be rated in such poor-rate or shall be rated therein together with other property not chargeable to the duties hereby granted, or there shall be no poor-rate in the parish or place where such house is situate, and in every case where the rules before mentioned are not applicable, the said assessors shall make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let, or, if not let, the rent which they respectively are worth to be let by the year.

Rule 14. Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively.

By s. 45 of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act, 1869), it is enacted:

That the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall, for all or any of the purposes in this section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted: that is to say:

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(2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely:

(*a*) The tax on houses levied under the House Tax Act and the Acts therein incorporated or referred to.

By s. 76 it is enacted:

That, where, for the purpose of the Acts relating to the duty on inhabited houses, or to the duties charged under schedule B. of the Income Tax Act, or to the sale of exciseable liquors, it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not been passed.

The questions for the Court (who were to draw inferences of fact) were:—

1st. Whether the property is properly assessed to the inhabited house duty as 7 dwelling-houses only, on the association as occupiers; or whether each of the 117 suites or sets of chambers, of which the entire buildings consist, should be separately assessed on the tenants thereof respectively.

2ndly. If the Court should be of opinion that the property is properly assessed as 7 separate dwelling-houses for the purpose of assessing the inhabited house duty, then, whether the value of each of the 7 blocks is properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in the occupation of the tenants of the association in that block, or whether the commissioners ought not to make a separate valuation on the association itself of each block under s. 76 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

The majority of the Court below (Bramwell and Cleasby, BB.) held, first, that rule 6 of sch. B. applied, and that the property was properly assessed as 7 dwelling-houses only on the association as occupiers; secondly, that the value of each of the 7 blocks was properly represented by the aggregate sum of the values appearing in the valuation list.

Kelly, C.B., contrà, held that rule 14 of sch. B. applied, and that the respective tenants of the different suites ought to have been assessed as occupiers of distinct properties.

Manisty, Q.C., and *Poland*, for the appellants. First, the assess-

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ment is wrong. Each of the 117 tenements is a "house" within 48 Geo. 3, c. 55, sch. B, rule 6, and ought to be assessed as such to the house duty. Each of these tenements may be let in different apartments or lodgings. *Reg.* v. *St. George's Union* (1) decided that each of the 117 tenements was a "house" for the purpose of being assessed to the poor-rate within the meaning of 43 Eliz. 2, s. 1, and if it is now decided that each tenement is not a "house" for the purpose of the house duty, the object of the Valuation (Metropolis) Act, 1869, will be defeated, which was to secure a uniform assessment and valuation for the poor-rate and the house duty. It has been frequently held that tenements such as these are "houses" within the meaning of various statutes: e.g. in *Evans and Finch's Case* (2) it was held that Hugh Audley's chamber in the Inner Temple was his "dwelling-house" within 39 Eliz. c. 15. In *Reg.* v. *Great, &c., Usworth* (3) it was held that a man who rented and occupied the middle floor of a house from the owner of the house occupied "a separate and distinct dwelling-house" within 6 Geo. 4, c. 57, so as to gain a settlement. So in *Henrette* v. *Booth* (4), a man who occupied the upper floor of a house consisting only of two rooms was held entitled to the borough franchise as tenant of a "house" within the Reform Act, 2 Wm. 4, c. 45, s. 27. There is nothing in any of the other rules in sch. B. which conflicts with this view. Rule 4 makes any single chamber in any of the Inns of Court, &c., chargeable as an entire house, provided it be severally tenanted or occupied. Those buildings do not resemble these blocks in structure or mode of occupation. This answers the question put by Bramwell, B., in the Court below (5)—"if rule 6 includes this case, what need was there of rule 4?" Rule 6 was meant to meet cases where the rooms in flats such as the present were let to different occupiers, and to make the landlord or owner of the flat chargeable as the occupier. But assuming in favour of the Crown that each tenement is not a house within rule 6, then each block is within rule 14 a "dwelling-house divided into different tenements being distinct properties." This was the view of Kelly, C.B., in the Court below.

(1) Law Rep. 7 Q. B. 90.
(2) Cro. Car. 473.
(3) 5 Ad. & E. 261.
(4) 15 C. B. (N.S) 500; 33 L. J. (C.P.) 61.
(5) Law Rep. 10 Ex. at p. 318.

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The association had statutory power to demise or sell any of the 117 tenements separately from the others. If they had actually sold to their tenants the tenements would clearly have been "distinct properties." Can it make any difference in the principle of assessment whether the instrument between the association and the tenants is a demise or a conveyance? If the words of rule 14 "any dwelling-house *divided* into different tenements" means structurally divided, as distinguished from the words of rule 6 "any house *let* in different storeys, tenements, &c.," then this house is clearly within rule 14. Secondly, assuming in favour of the Crown that the assessment must be on the association in respect of each block, and not upon each tenant in respect of each of the 117 tenements, the valuation is wrong; since s. 76 of the Valuation (Metropolis) Act, 1869, requires that there must be "a separate valuation" of each hereditament. Now each block as such has not been separately valued. The assessment of each block has been arrived at by adding up the values of each of the several tenements, but the result is not the true value of the block, because many of the tenements have never been let, and because no allowance is made for loss of rents upon a change of tenants, or when the tenements are undergoing repairs. The result is a grievous injustice to the appellants, since if one of the 117 tenements is let and the rest unoccupied the house-duty must still be paid as if all were let. This will be remedied by a "separate valuation" of each block as such under s. 76, when allowance for empty suites, &c., will be made. There seems to have been some misapprehension upon this matter in the Court below, where it was supposed that it was impossible to resort to s. 76 (see per Cleasby, B. (1)), but no reason is given for this in the judgments, and none was suggested during the argument.

[LORD COLERIDGE, C.J. Perhaps the reason is furnished by rule 7 of sch. B.]

That leaves the case exactly where it was before: the blocks have not been rated to the poor-rate, the suites composing the blocks have been rated. Rule 11 is more to the point and if it

(1) Law Rep. 10 Ex. at pp. 316, 317.

applies the assessors have not complied with that rule, since they have not valued the blocks as such.

Gorst, Q.C., and *Pinder*, for the Crown, were not heard.

JESSEL, M.R. This is an appeal from the judgment of a majority of the judges of the Court of Exchequer deciding what is the true construction of 48 Geo. 3, c. 55, sch. B., relating to the mode of charging the inhabitated house duty. It also involves to a certain extent the construction of the Valuation (Metropolis) Act, 1869. The first point argued is that certain apartments or ranges of apartments in certain blocks of buildings are, according to the true construction of 48 Geo. 3, c. 55, sch. B., to be valued or rated as separate houses. The circumstances—the details of which are set out in the special case—are shortly these: —There are seven blocks of buildings in Victoria Street built by the appellants, the Westminster Chambers Association. They differed slightly, no doubt, from ordinary inhabited dwelling-houses, but not materially; because externally they are exactly like seven ordinary dwelling-houses built on to the street with ordinary windows, roofs, &c.; but internally they are divided into separate tenements or suites of apartments in such a way that each suite has, so to say, its own door, cutting it off from all the other tenements or suites. That is the substantial distinction; each set of apartments is, so far as possible, self-contained, and has all the necessary conveniences to enable people to take it as a place of business. Except for its size, and except for this peculiarity, as to each landing having only one door, or one door in each set of apartments, the block does not differ from an ordinary building. Then how would you describe each one of those seven buildings? There cannot be a doubt that you would call each a house. It was not denied before us, nor does it seem to have been denied in the Court below, that both the ordinary and the legal meaning of the word "house" would comprise the building in question. Therefore, whether we look at the word as in common use in the English language or in legal documents, there is no doubt as to its being a term which would properly describe each of these seven buildings.

That being so, before considering the statute, it may be as well

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to say a word or two upon what I think are the established rules of construction, which, whether forgotten or not, are often disregarded in argument, and I am afraid sometimes even in judgments. Those rules, I take it, are these: In construing legal instruments, whether Acts of Parliament or not, it is the duty of the Court to give to every term used its ordinary and legal meaning, unless there is something either in the nature of the subject-matter or in the context which compels the Court to come to a different conclusion. Consequently it is for those who say that the word is not used in the instrument in its ordinary legal acceptation to shew something grounded on one or other of those considerations to prove that it is not so used. So far from finding anything of the kind in this statute, I do find a great deal confirmatory of the proposition that the word "house" is used in its ordinary sense. Now the line of argument adopted on the part of the appellants was this: It was said that the Court in construing other legal instruments, other Acts of Parliament, directed to a different subject-matter and with another context, had come to the conclusion that a portion of what in ordinary language is a house—a set of apartments in a house, or a room or two in a house—might properly come within the description "house" as used in those other legal instruments or Acts of Parliament. That argument seems to me inadmissible, because it is attempting to construe the instrument in question, not, as we ought to do, by reference to its own meaning and contents as a whole, but by reference to other instruments and other Acts of Parliament to which it has no relation. But the argument was weak on another ground. It was not suggested that there was any decision or authority for saying that this building was not properly described as a house. The authorities referred to only shew that in some cases a portion of a house may be described as a house, but no authority was produced or alleged to exist that any high house could not be properly so described, although portions of it also might fulfil the description. Now those two propositions are not inconsistent. Everybody knows that we constantly describe a part of a house as a "house." The instances are numerous and familiar. Without going out of the terms of this Act of Parliament, we find it mentioned over and over again. We find in this

Act of Parliament, not only a dwelling-house, which is the main thing, but we find a coach-house, and a wash-house, and a ware-house, and a counting-house, all of which, as a general rule, are not separate buildings, but portions of a building, and are to be treated as portions of a dwelling-house for the purpose of this Act. We might easily increase the number—out-houses, fowl-houses, straw-houses,—which are portions of a house, and others which are too numerous to mention. To take another instance familiar to lawyers, everybody knows that the total of the Inner or Middle Temple, or any of the other Inns of Court, is spoken of by those bodies as "the house," but that includes a vast number of houses. So, again, any one of the old religious houses was always spoken of as a "house," though it included many buildings and separate houses. We have the same term still applied in many instances. The Charter House is still so called, although it includes many separate houses. The mere fact, therefore, that a separate portion may well be called a house does not shew that the aggregate or entire building may not also be properly described as a "house."

A good illustration of that is afforded by the case of *Evans and Finch* (1), which was cited for the purpose of inducing the Court to come to an opposite opinion. The man was indicted for having broken open "domum mansionalem Hugonis Audley," and the question was whether the property was well described in the indictment as being Hugh Audley's "dwelling-house," being in fact Audley's chamber in the Inner Temple, and it was decided that it was well described. Nobody suggested that the total number of chambers in the house could not have been well described as a "house." That was not the point, the only point was whether the one set were sufficiently well described; and it is quite plain that everybody thought the other point was beyond argument, for the special verdict treats it as being a part of a house; it says "that divers persons were in the Inner Temple hall and in other places of the house," that is, in the hall and other places of the house which included chambers. That being so, it does not appear to me that the point suggested, even if other-

(1) Cro. Car. 473.

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wise proved, would have had a direct bearing upon what we have to decide.

Another Act referred to was the well-known statute 43 Eliz. c. 2, s. 1, which, it must be remembered, related to the rating of occupiers not merely of "houses" but "lands" and "houses," the word "lands" being a word of very large import in English law, and certainly including, not only any house, but any part of a building which might stand on the land. In the decisions upon that statute the question was whether there was a separate occupation. How far the land being in juxtaposition with the house influenced the judges it is immaterial to inquire. It is enough to say there was a different subject-matter and a different context. A similar observation applies to the cases on the Settlement Acts. There the words were totally different, words apparently pointing to severance and occupancy, and those words again received a different construction in relation to a different subject-matter and a different context.

I, therefore, pass by that argument, and I now come to the real point we have to decide,—what is the meaning of the word "house" in the statute before us, the general meaning being what I have said? Is there any reason for saying that you ought to adopt a different reading with respect to these particular houses? It is singular that the only legislative direction or definition that we can find relating to these particular houses affords an argument against the appellants. It is not wanted, because you must construe the word according to its ordinary use, even without this legislative direction, but it is there—in the Westminster Improvement Act, 1853 (16 & 17 Vict. c. clxxvi.), which, of course, is as much an Act of Parliament as any other, and, besides that, being the Act of the association, it contains their own description of their own property, and a description, therefore, which cannot be very well refused by the appellants. Sect. 69 enacts, "that where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors, or assigns may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house." Nothing could be plainer: as regards these par-

ticular buildings the legislature has described them as a "house." It has described the apartments as part of the house which may be sold away from the rest of the house, and the Commissioners themselves (whose successors the appellants are) have so described the property in question, shewing that they took the same view as to the meaning of the word applied to these buildings that I am disposed to do on general principles of construction. Then is there anything in 48 Geo. 3, c. 55 to alter the construction? As I read it it is all the other way. The first rule says, that the duty shall be charged "on the occupier or occupiers for the time being of every such dwelling-house," &c., in a certain way. The second is "every coach-house, stable, brew-house, wash-house, laundry, wood-house, bakehouse, dairy, and all other offices," &c., "belonging to and occupied with any dwelling-house shall in charging the said duties be valued together with such dwelling-house." These several houses are mentioned which might be separate, and if held and occupied separately, then separately valued, but if belonging to and occupied with any dwelling-house they are to be valued "together with such dwelling-house." It then restricts the extent, "provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued." The third rule says, all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall in charging the said duties be valued together with the dwelling-house. Now, there is communication here and something more. Then come certain exceptions. Then comes rule 4, which says, "every chamber or apartment in any of the Inns of Court," and so on, "being severally in the tenure or occupation of any person or persons, shall be charged thereto, as an entire house, and on the respective occupiers thereof." That is a separate enactment. I do not think it bears very strongly either way, but if it has any bearing at all, being an exception, it would rather prove that without those words such a chamber or apartment would not be so charged.

The most important rule is the 6th. [His Lordship read it.] Now it is said that each block is not a house "let in different storeys, tenements, lodgings, or landings" within that rule. If any words in the English language could in my opinion aptly describe

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each of these seven buildings, it would be those words: they are actually let out in different storeys, they are let out in different tenements, they are let out certainly partially—it is the exact thing. It is said to be a hardship so to construe it, because a large portion of the house may be uninhabited. It is no part of my duty to give any opinion as to whether it is a hardship or not; but admitting it to be so, that is what the legislature has directed in the case put. If one storey only is let out of six, and the rest uninhabited, there is an express enactment that payment is to be made for the whole house. Nothing can be plainer. But it cannot be a greater hardship where the house is one house in every sense of the term, and where it is let in separate tenements, as it is here. If hardship there be, it is the same in both cases, and it is plain the legislature, for some fiscal reason, intended that though five-sixths of the house might be uninhabited, the whole tax should be paid.

It is necessary now to read the 14th rule: "Where any dwelling house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively." It has been suggested that that rule applied to the present case. But the point, I think, is very plain indeed—"different tenements being distinct properties." The 6th rule contemplates tenements which are not distinct properties. What is the meaning of "distinct properties?" Here, again, you must apply the same rules of construction. "Divided into different tenements in distinct ownerships," is the primary meaning. Are these distinct ownerships? It is plain they are not, because there is only one landlord and one tenant for each of the tenements; there is a direct letting from the landlord, the owner, to the one tenant below him. If the tenements had been sold to different people, and there had been several demises, it would have been a different thing; there would then have been different landlords, and perhaps intermediate tenants, and I do not say what our decision would have been; but that is not the case here; it is a mere letting; it is not within the 14th rule, because in no sense can there be distinct properties, there being but one landlord throughout.

There was another argument as to "distinct properties" which I was not quite able to follow. It appears to have been suggested that the word "property" may be used not in its ordinary sense as shewing ownership, but as shewing some distinction of structure, that is, not as describing the proprietorship but as describing the structural character of the building. I think that is not the true meaning, but even if it were, looking at the word "divided" and looking at the word "distinct," I should say these tenements were not within the 14th rule. I do not think that these properties are distinct in the sense of any severance of that kind; we should want a physical distinction which everybody could see. Therefore, taking the Act of Parliament and the rules together, for the reasons I have given, I think that these seven buildings are properly described and charged as houses within 48 Geo. 3, c. 55.

Then comes the second question. The tenements have been rated to the poor under the Valuation (Metropolis) Act, 1869, as separate tenements; the annual value is set upon each, so that there are 117 annual values; and now the question comes, How are you to estimate the value for the purpose of the house-tax? Now that must depend upon the Valuation (Metropolis) Act, 1869. The object and meaning of that Act is plain; it is, as stated in the preamble, to provide uniformity of assessment for local taxation as far as possible. That being pointed out by the legislature as the object—and a useful object it is—you are not to go out of your way to defeat it. Then s. 45 enacts that the valuation list is to be, for the purpose of the house tax, conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted. So that if that section stood alone it would be conclusive. But then comes s. 76 [which his Lordship read]. Now it is said that, under those words, inasmuch as you have to value the house, and the house as such has not been separately valued in any valuation list, though each tenement composing the house has been so valued, it is necessary to make a separate valuation of one hereditament, namely, the house. One answer to that might be that the words "separately valued" mean when you

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cannot ascertain its separate value; and that in the present case you can ascertain its separate value from the valuation list by adding up the value of all the tenements; in fact, that it is for this purpose separately valued, because you can ascertain without going beyond the list the total separate valuation of the hereditaments. It may be in two parts or in ten parts, but the total of the two or the ten parts does give you the separate valuation. But there is another answer pointed out by Lord Coleridge during the argument, which I think is quite conclusive, that is, the 7th Rule of 48 Geo. 3, c. 55, sch. B, the meaning of which is that "no dwelling house or other such premises as aforesaid shall be valued at less" than the poor-rate value. Now the poor-rate value of this house is the total value of all the tenements, and that has been decided by *Reg.* v. *St. George's Union.* (1) Therefore, since the 7th rule enacts that, whatever value you put on the house for the purpose of that Act, it shall not be less than the poor-rate value, and since it is admitted by the appellants that the poor-rate value is certainly not too little (on the contrary, they complain of it as being a great deal too much), it is not necessary, under s. 76 of the Valuation (Metropolis) Act, 1869, to make the separate valuation for the purpose of the house duty, because you have the poor-rate value ascertained, and that must be sufficient to enable you to assess the house-tax, which is all you are required to do.

It appears to me, therefore, that on both grounds the decision of the majority of the Court below was right and ought to be affirmed.

LORD COLERIDGE, C.J. This case has been so fully discussed by the Master of the Rolls that I have very little to add. I will simply say that the point being substantially whether the 6th rule of schedule B of 48 Geo. 3, c. 55, does or does not apply to the subject-matter of this rating, it appears to me (quite assenting as I do to the line of argument which the Master of the Rolls has pursued in his judgment) to be conclusively decided by s. 69 of the Westminster Improvement Act, 1853. The appellants have an Act of Parliament under which they erect what the

(1) Law Rep. 7 Q. B. 90.

Act itself calls "a house occupied by different persons in distinct sets of apartments;" and the question is, whether, that being passed in 1853, we are to construe those words in any different sense from the words "house let in different storeys, tenements, lodgings, or landings" in 48 Geo. 3, c. 55, which was passed in 1808. Now the words certainly are not identical, but they are as nearly identical as words can be, and when the construction of the appellants' Act is perfectly plain, it seems to me it would be unreasonable to torture words exactly similar in an Act of 1808 and make them mean something entirely different from what admittedly they mean in the Act of 1853, an Act giving the powers to the appellants under which those very blocks of buildings have been erected. I therefore think upon that short point the construction is plain. With regard to the case of *Evans and Finch* (1), when the statute 39 Eliz. c. 15, upon which it is decided, comes to be looked at, the case is as plain as possible, but not the least in point. That statute takes away the benefit of clergy if the defendant has been found guilty and convicted of taking in the daytime any money, goods, or chattels above the value of 5*s.* from any dwelling-house or dwelling-houses, or any part thereof. It is difficult to see how Audley's chambers in the Inner Temple could be anything but either a dwelling-house or a part of a dwelling-house; and as the man had undoubtedly taken 40*l.* out of those chambers, I do not wonder that the judges thought the point unarguable, and decided that he was clearly guilty, and that the benefit of clergy was taken away from him. On the second point I have nothing to add.

POLLOCK, B. I am of the same opinion. Sect. 1 of 48 Geo. 3, c. 55, grants duties "upon inhabited houses, as set forth in the schedule to this Act." I suppose no man at that time could have doubted what was meant by an inhabited house generally. Then in rule 6 the words "where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families," seem to me to be the very apt and proper words to describe a house let exactly as these blocks are, and you cannot have a stronger observation than that

(1) Cro. Car. 473.

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you find nearly the same language imported into the Act of the appellants themselves. As to rule 4, I think Mr. Manisty is right in saying that it ought not to be treated upon the principle of expressio unius exclusio alterius. I think it only shews that those who drew the rules framed the language carefully and with due regard to the circumstances of particular cases. With regard to the second point I have nothing to add. The 7th rule, to which our attention was called by Lord Coleridge, appears to meet the present case, and we ought not to say that any re-valuation is necessary with regard to these premises.

Judgment for the Crown affirmed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Burchells.*

June 19.

[IN THE COURT OF APPEAL.]

LEWIS *v.* CARR.

Alderman or Councillor of a Borough—Interest in a Contract with Council—Disqualification during Continuance of Contract—Penalties for acting—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *ss.* 28, 52, 53.

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The disqualification, under s. 28 of 5 & 6 Wm. 4, c. 76, of any person who has any interest in a contract with the council of the borough, to be elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or councillor does not cease to be qualified or become disqualified within the meaning of s. 53, so as to incur penalties for acting after the termination of the contract.

THIS was an action brought by a burgess of the borough of Macclesfield to recover five penalties of 50*l.* each from the defendant for acting as an alderman of that borough. The declaration alleged that before and at the time of so acting the defendant had become disqualified to hold the office of alderman of the borough by having a share and interest in certain contracts for the supply of goods by the defendant to the council of the borough.

At the trial before Lord Coleridge, C.J., at Chester, at the summer assizes, 1875, it appeared that the defendant was a tallow chandler in the borough of Macclesfield, which is a

borough within sched. A. of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), and that in the year 1874, while holding the office of alderman of the borough, he had sold goods on several occasions to the corporation on orders drawn up by the waterworks committee of the council, and approved by the council, and sent by them to the defendant's place of business. Payment was made at intervals by orders signed by three members of the council and counter-signed by the town-clerk. In May, 1875, the defendant acted on five several occasions as alderman, and these were the offences for which the penalties were sought to be recovered. At that time all the goods that had been supplied by the defendant to the council had been paid for, and there were no outstanding transactions between them. On these facts the learned judge held that any supply of goods to the council was within the 28th section of 5 & 6 Wm. 4, c. 76 (1), and disqualified the defendant

(1) By 5 & 6 Wm. 4, c. 76, s. 28, "Nor shall any person be qualified to be elected or to be a councillor of any such borough or an alderman of any such borough . . . . during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such council."

By s. 52, "If any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, or being mayor shall be absent for more than two calendar months, or being an alderman or councillor for more than six months at one and the same time (unless in case of illness) from the borough of which he shall be mayor, alderman, or councillor, then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid . . . . and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town-clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void . . . ."

By s. 53, "If any person shall act as mayor, alderman, or councillor, or auditor, or assessor for any borough, without having made the declaration hereinbefore required in that behalf, or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified according to the provisions of this Act, or after he shall have become disqualified to hold any such office, he shall for every such offence forfeit the sum of 50*l*., such sum to be recovered, with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, by action of debt or on the case in any of his Majesty's superior courts of record, &c."

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from being an alderman, and subjected him to penalties for subsequently acting. He accordingly directed a verdict for the plaintiff for 250*l*. A rule nisi was afterward obtained for a new trial, on the ground of misdirection.

Feb. 24, 1876. *Arthur Williams* (*Sir H. Giffard, S. G.*, with him) shewed cause. The transactions were contracts, and the disqualification having once arisen must be continuous. The case is within the mischief which the Act was intended to remedy. The limitation of time in s. 28 is not applicable to a person who is already in office, and that section was intended to be read as applying a temporary disqualification from being elected during the continuance of an interest in the contract, but as absolutely taking away the qualification in the case of any person who is already an alderman. If the defendant was disqualified from being an alderman under s. 28, he has incurred the penalties under s. 53 by acting afterwards, unless he resigns or in some way ceases to hold the office and is re-elected. [He referred to *Nicholson* v. *Fields*. (1)]

McIntyre, Q.C., and *Coxon*, in support of the rule. All the words of the 28th section must have effect given to them, and the disqualification to be an alderman, as well as that to be elected, must be during the time there is an interest in the contract. Otherwise a sale over the counter of any small amount would be a contract which would have the effect of a permanent disqualification. The statute is aimed at continuing contracts. Where there is an intention to avoid the office, it is clearly expressed as in the 52nd section. In s. 53 there must be some limit of time, for a person who has lost a qualification is not barred thereby for all time from being an alderman or councillor if he becomes properly qualified and is re-elected. That section must, therefore, be read as applying to acts done after and during disqualification, and the defendant has, therefore, incurred no penalty. [They referred to *Reg.* v. *Francis*. (2)]

BRAMWELL, B. I think this rule should be made absolute. I think the plaintiff did not prove his case. Whether the legisla-

(1) 7 H. & N. 810; 21 L. J. (Ex.) 233. (2) 18 Q. B. 526.

ture intended that such contracts should or should not be within the Act is another matter, but I think if a shilling's worth of stationery were bought of an alderman there would be a contract between the corporation and that alderman. Probably if they had intended it they would have used the word "dealing," or some such word. However, it is a contract, and, independently of any reasoning upon the matter, I think it is concluded by the case of *Nicholson* v. *Fields* (1), where a somewhat similar contract was involved. There it was a bill for lime supplied to certain commissioners. In this case it is a casual supply of candles, or some such thing. The question, then, is, whether the defendant's acts have brought him within the 53rd section of the Act. I do not like—and it is generally useless—referring to pleadings, but where it is necessary that the case be logically stated, either under the old system or under the more modern form of pleading, one cannot help getting some assistance by looking at the mode in which it has been put by the pleader; and I think if we look at the declaration in this case it will be found that the plaintiff has not proved his case. The declaration says that the borough of Macclesfield is a corporation within the Municipal Corporation Act; that the defendant claims to be an alderman of the borough, and that before and at the time of the committing of the grievance he had become disqualified to hold the office of alderman of the borough. That has certainly not been proved, because Mr. Williams concedes that if he had put himself up for election as an alderman at the time the declaration is speaking of, he would have been undoubtedly qualified to hold the office. It is true that he could not have put himself up at that time, because he was already in office, and perhaps could not be removed except by a quo warranto; but still, if in some way or other he had got out of office he would not have been, as the declaration says, "disqualified to hold the office of alderman." Then it goes on to say this, "To wit, by having a share and interest in certain contracts within the borough." Now I construe that to mean—and it is obviously the plain meaning—that at the time he committed the offence he had "an interest in a contract." If it had meant "having had," it should have said so, but it does not do so. This

(1) 7 H. & N. 810; 21 L. J. (Ex.) 233.

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pleading, to my mind, correctly states the offence under the statute, but it satisfies me that the plaintiff has no case. Now, instead of dealing with the declaration, I will deal with the substance of the matter. It is alleged that this defendant, by what he has done, has brought himself within the 53rd section of this Act of Parliament. Before considering the 53rd section it will be as well to call attention to the 52nd section, which states that if any person holding the office shall be declared a bankrupt, or any of the other things there mentioned shall happen, he shall "immediately become disqualified, and shall cease to hold the office." The 53rd section says that if any person shall act as alderman without being duly qualified at the time of making the declaration, or after he shall cease to be qualified according to the provisions of the Act, or after he shall have become disqualified, he is to forfeit for every such offence the sum of 50*l*. Now the defendant had not become disqualified, because that means disqualified as previously stated, and that he had certainly not become; therefore the question is, whether he had "ceased to be qualified according to the provisions of this Act." In order to ascertain whether he had ceased to be qualified, we are referred to the 28th section of the Act, under which it is argued that he had ceased to be qualified. Now, let us look at the 28th section and see what it says. It says that, "No person shall be qualified to be elected"—leaving out for the moment the words "or to be"—"during such time as he shall have any interest" in a contract of this sort. If that was all, of course that would not do, because he had no interest at the time he was elected; but there are the further words "or to be;" and Mr. Williams says the meaning is that he shall not be elected if at the time of his seeking election he is interested in a contract, or if after election he becomes interested in a contract, he shall not continue "to be" an alderman of the borough. Then Mr. Williams had some little difficulty to contend with the word "during," but I think he was not averse to adopt this mode of dealing with it, that is, either to say that sense must be made of it in some way or other which is not for him to point out, or at all events, if the word "during" is to continue in, that then we are to take it with this consequence—that, inasmuch as he cannot be an alderman

during the time he shall have ceased to be de jure an alderman, and shall be liable to be turned out upon a quo warranto, and as he does not come into a lawful aldermanic condition, that is to say, he does not resume his aldermanic status lawfully on ceasing to be interested in a contract, the section must be read thus: He shall not be elected if he is interested at the time of the election, and if he becomes interested afterwards he shall cease to be an alderman de jure. Now I am not at all sure that that ingenious argument is well founded. I am not at all sure that the meaning is not that the law-maker supposes that it is not enough to say that he shall not be elected, because it might be said, "they ought not to elect him, but they have done so." I think that might be an argument, although, perhaps, a bad one, but still it is not unfrequently guarded against by this sort of expression—"he shall not be elected, or if elected, he shall not be." I am not sure that the legislature had any further meaning in the words they use in that section than that; but supposing we were to put upon it the meaning which Mr. Williams says we ought, and were to read it thus: "that he shall not be elected if at the time of his election he is engaged in a contract, or if, after election, having become interested in a contract he shall cease to be;" is that within the 53rd section of the Act of Parliament? The 53rd section says that if he shall act without being duly qualified a certain thing shall happen; but if Mr. Williams' argument were stretched to the utmost, it does not follow that the defendant has acted without being duly qualified: the argument, in fact, proves not that he is disqualified, but that he is not an alderman. Now if the statute had said that he shall not act, not being an alderman, then it might have been that Mr. Williams' argument might have gone a long way to prove that he was not de jure an alderman; but the 53rd section says "without being qualified." Now he is qualified, because it is conceded, and indeed it is clear, that if by any chance he got out of office he could immediately offer himself for re-election. It is impossible for me to read those words as suggested, because this consequence would follow, that if there was an informality in the election which would subject the man to be turned out upon a quo warranto, he would be subject to penalties during all the time he acted. I do not know that there

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is any provision in the Act of Parliament against that, and if not, and we hold that this is extended to a man who is acting, and is not de jure an alderman, there is nothing to prevent him being subject to penalties. It seems that, giving the utmost weight to Mr. Williams' argument, s. 28 only shews this gentleman is not de jure an alderman, and that s. 53 imposes no penalty upon a man who is acting de facto as an alderman, but is not one de jure, but imposes a penalty where he is not duly qualified; and that is not the case with this defendant.

There is another argument which has incidentally arisen, which seems to me to be very strong to shew that that must be the meaning of the statute. Mr. Williams did not tell us what would be the consequences of s. 28 being interpreted as he said it ought to be, whether the office was ipso facto void, or whether it could be made void upon a quo warranto; but he comes to the conclusion now, as I understand him, that it is not ipso facto void, but that it is void upon a quo warranto. Now observe the consequence: the quo warranto must be moved for within a year. Suppose it is not moved for within a year, then the man is an alderman, and de jure an alderman, and he cannot be turned out, and yet he cannot act without being subject to penalties. That seems to be an inconsistency, and it seems to demonstrate that Mr. Williams' contention cannot be maintained.

But then we are met with an argument that we must deal with the words of those sections strictly, and that we ought to put the construction upon them for which the plaintiff contends in this case, because the consequence of not doing so would be very disastrous. I do not agree with that; I am by no means clear, as I said before, that the legislature intended to deal with such a case as this in this way. I think that what they had in their minds, very likely, was one of those continuing contracts, that is to say, a contract for the supply of coal for a year, or a contract to do a large piece of building, or something of that kind where a man may make a large profit if he has got friendly persons to contract with him; and I doubt very much whether the legislature intended these words to comprehend the case where there was a trifling dealing over the counter, and where the price paid for the articles was well known. It has been suggested that if this were to be allowed

you would have one alderman, who is a stationer, on one day giving an alderman, who is a coal merchant, an order on different terms to what he would a member of the public, to supply coals, and that then the coals would be supplied and paid for, and thereupon the alderman who is the coal merchant would do the same good turn to the stationer; I doubt very much whether that sort of thing was intended to be provided against, or that it was apprehended as likely to take place. I think that, looking at the whole of the provision, the prohibition is against acting during the contract, and I think that was the mischief which the legislature intended to guard against, and that they were content that after the contract was over he should act, knowing that under those circumstances it would prohibit the making of long contracts, because of the disqualification penalty in the case of an alderman acting, and they not caring much about prohibiting a short contract of this kind. I really do not feel pressed by the difficulty as to the policy of the Act, and upon the words of it I think there was no case to go to the jury, and consequently that this rule must be made absolute for a new trial.

CLEASBY, B. I have come to the same conclusion, feeling to some extent that the case is within the mischief pointed at by the Act, but in this penal clause of the statute, feeling bound to give a somewhat strict interpretation to the language. I do not feel myself much doubt that this contract is not only within the mischief contemplated by the Act, but that it comes within the terms of it. The only assistance which I can obtain towards construing the Act is from the terms of the subsequent statute, 15 Vict. c. 5, which explains this Act and amends it. That Act has this clause in it: "That from and after the passing of this Act no person shall be deemed to have had or to have an interest in a contract or employment, with, by, or on behalf of such council, commissioners, or trustees, by reason only of his having had or having a share or interest in any newspaper in which any advertisement relating to the affairs of any such borough, council, commissioners, or trustees, may have been or may hereafter be inserted," which shews that the previous statute applies to simple acts of that sort, and not merely to permanent contracts. That being so the ques-

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tion which we have to deal with arises on the 53rd section, which imposes a penalty if he shall act after he has become disqualified to hold office. The words are "after he shall have become disqualified," but that must be read to mean "after he shall have become disqualified and while he is disqualified." Now it is conceded that although he may be disqualified it is not a permanent disqualification, but that he might be re-elected, and might then be entitled to act. We must, therefore, necessarily read the 53rd section as making the penalty attach to acting while the disqualification exists. I have not the least doubt that the office would continue full, indeed this is pretty plain on a comparison with the 52nd section, the language of which is much stronger, and distinctly points out that in the cases there mentioned the office is void, and what steps are to be taken thereupon. Then we come to the difficulty in the construction of the 28th section. I do not feel myself justified in giving any different effect to the word "during" with reference to cases which have gone before it, and as I am obliged in reference to the first part of the sentence, respecting the disqualification to be elected, to limit that disqualification to the time during which there is an interest in the contract, I do not conceive, without some stronger reason than has been given, that I should be justified in giving to the same words applied to different and distinct cases "to be elected" "or to be" a different meaning. I feel bound, therefore, to hold that the disqualification to be an alderman was limited to the time during which there was an interest in the contracts, and that it is not made out that the acting took place under the circumstances of the disqualification mentioned in the section.

AMPHLETT, B. I am of the same opinion. Looking at the words of the 28th section, they seem to me as they stand to be very sensible. They require no violent interpretation at all to give them a sensible effect, for what the section says is this, "That no person shall be qualified to be elected or to be an alderman during the time he shall have any interest in a contract," that is, if he is interested in a contract at the time of the election, he shall not be qualified to be elected, and if he afterwards should become interested, he shall not be qualified to be an alderman during such

time as he shall be so interested in the contract; he is not qualified de jure to act or be an alderman, and, therefore, might be removed by a quo warranto. That gives a plain and intelligible meaning to the words, and I do not see why we are to travel out of those words in order to give a more extensive effect to the clause than it would otherwise have, and I am very much confirmed in this opinion by seeing that in the same clause, that is, clause 28, it is said, and in almost the same words, "That no person shall be qualified to be elected or to be a councillor unless he shall have a certain property qualification," which is specified. Well, then, it would be said by Mr. Williams, and, in fact, consistently with his argument it could not be otherwise said, that if he had a property qualification according to the clause at the time of his election, but afterwards for a single moment, ceased to have that qualification, although he never acted during the time he had no real property qualification and subsequently re-acquired a property qualification, nevertheless he would be subject to penalties for afterwards acting, and that the only way of getting rid of his disqualification would be by re-election, although the mischief of the statute did not at all point to the necessity of his re-election. All the statute requires with regard to property qualification is, that when he acts as alderman he shall have a certain property qualification. It is very difficult, therefore, to say that if a person has ceased to hold a proper qualification by reason of some circumstance which has happened after his election, and has subsequently acquired a qualification, that still he would be liable to penalties, that is, that he has ceased de jure permanently to be an alderman. I cannot help thinking that it is very analogous to the case of a justice of the peace. What I find enacted by the statute 18 Geo. 2, c. 20, is, that from and after a certain date there specified no person shall be capable of being a justice of the peace, or of acting as such, for any county unless he has a property qualification, and the penalty of 100*l.* is there given to any person who will sue for it. The words are, "Any person who shall act as a justice of the peace without taking the oath," and so on, "or without being qualified according to the true intent and meaning of the Act, shall for every such offence forfeit 100*l.*" It has been argued that although the Act says that, "No person shall be a justice

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of the peace unless qualified," yet if he has ceased to have the qualification which he formerly possessed, he still remains a justice of the peace, and his acts are not void, but he is liable to the penalty; but although there are no cases cited on the subject, I find that Burns in his Justice of the Peace lays it down that if a justice of the peace has become disqualified and afterwards obtains a proper qualification, that then he may act without having a new commission, that is to say, he may act as a justice of the peace without being subject to the penalties. (1) That seems to be strongly analogous to the case now before us. I will only add that the 52nd section supports the view we have taken, because there it is enacted that when a person holding the office of alderman becomes bankrupt, or goes away for six months, not that he shall be disqualified from being elected or from being an alderman, but that his offices shall cease, that there shall be a vacancy in his office, and provision is made for filling up that vacancy, while in the 28th and 53rd sections the language is different, and it is admitted that there is no actual vacancy in the office. Therefore, in my opinion, this case does not come within the words of the section, and this rule ought to be made absolute.

Rule absolute.

From this judgment the plaintiff appealed.

June 19, 1876. *J. Brown, Q.C.*, and *A. Williams* argued for the plaintiff, and *McIntyre, Q.C.*, and *Coxon*, for the defendant, in support of the judgment of the Exchequer Division.

JAMES, L.J. I am of opinion that the judgment ought to be affirmed. It is conceded that, in the words of sect. 53, something must be implied or understood, as there must be some limitation in point of time; for the mere fact of a disqualification having once attached would not prevent a person from being elected or re-elected, when the disqualification was removed, and acting without incurring penalties. When we turn to the 28th section there is no sufficient reason for applying only to the election the limitation of the disqualification to the time during which there is an

(1) Title, Justice of the Peace, sect. 4.

interest in a contract. We must give full effect to all the words of the section, and doing so we find that the defendant was not qualified to be an alderman during the time of his interest in these contracts, that is to say, the disqualification is temporary. That being so, as he is only disqualified during the continuance of the contract under sect. 28, and is not charged with acting during that time, he has not incurred any penalty under sect. 53 by acting afterwards. The appeal must therefore be dismissed.

MELLISH, J. I am of the same opinion.

BAGGALLAY, J.A. I am of the same opinion. In considering the 28th section it is necessary to bear in mind the 52nd, for provision is made in that section for the cases in which there is a cessation of the office, namely, bankruptcy, insolvency, composition, or absence from the borough. In all those cases it is provided that the party shall immediately become disqualified, and shall cease to hold the office; and the section goes on to provide that on payment of creditors, or (in the case of absence from the borough) on return to the borough, the party being otherwise qualified shall be eligible for re-election. Had it been intended that a person once duly elected who had become disqualified by ceasing to hold a qualification, or by becoming interested in a contract should not be able to recover his status without re-election, that intention would have been expressed as in the 52nd section. I think, in the absence of any such words in the 28th section, there is a clear indication of what the legislature intended and that the Exchequer Division were right in the conclusion they came to.

QUAIN and ARCHIBALD, J.J., concurred.

Judgment affirmed.

Solicitor for plaintiff: *A. E. Francis.*

Solicitors for defendant: *Stephens & Stephens for Parrott, May, & Sons, Macclesfield.*

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[IN THE COURT OF APPEAL.]

ASPDEN *v.* SEDDON AND ANOTHER.

PRESTON AND OTHERS *v.* SEDDON AND ANOTHER.

Grant of Land reserving Minerals—Right to work Minerals, paying Compensation for Damage—Enforcing Claim for Compensation—Easement—Right to Support.

The owner in fee of an estate granted away a portion of it, which ultimately became the property of the plaintiff, but reserved a rent-charge (subsequently redeemed), and also the minerals under the land so granted and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land. The grantee (for the better securing of the rent-charge) covenanted to build a mill on the land granted to him. The owner in fee afterwards granted to the defendants' predecessor in title the minerals, rights, and liberties so reserved, and also the other and adjacent portion of the estate. The defendants, who took with notice of the agreement as to the payment of compensation, worked the minerals under the plaintiff's land, and also the minerals under their own land, and by the operation of one or other of these workings, or by their joint operation, let down the surface of the plaintiff's land, and so injured the mill which had been built there in accordance with the covenant:—

Held, affirming the decision of the Court below, first, that the right to work the subjacent mines being subject to the condition of paying compensation, the plaintiff could maintain an action for the injury done to the mill by the working of those mines.

Secondly, that if the injury arose from the working of the mines under the adjacent lands, or from the combined effect of working those mines and the subjacent ones, the plaintiff was still entitled to recover.

THESE were two actions brought (1.) by the occupier and mortgagor in possession, (2.) by the mortgagees of a cotton mill and premises at Westhoughton, in Lancashire, against the defendants, as owners and workers of coal mines situated under and near to the mill, to recover compensation or damages for the letting-down of the mill and of the site thereof by the working of the mines.

The action *Aspden* v. *Seddon* came on for trial at the Manchester summer assizes, 1875, before Archibald, J., and a special jury, when, by agreement between the parties, a verdict was taken for the plaintiff in *Aspden* v. *Seddon*, and the record was withdrawn in the action of *Preston* v. *Seddon*, subject to a reference in each case of the cause and all matters in difference, with power

to the arbitrator to raise for the opinion of the Court of Exchequer any preliminary questions of liability, without assessing damages or finding any disputed facts as to the causes or extent of the alleged damage. A case was accordingly stated, from which the following facts appeared :—

William Stott, the owner in fee of an estate situated at Westhoughton, and of the mines and minerals thereunder, by an indenture dated the 31st of December, 1861, conveyed a portion thereof (subject to the exception and reservation hereinafter mentioned) to John Pilkington, as a trustee for the Westhoughton Cotton Manufacturing Company, Limited. The piece of land so conveyed was made subject to the payment to Stott and his heirs of a chief rent, which has since been redeemed. William Stott retained the residue of the estate in his own possession, and for the purpose of distinguishing it it is hereinafter called "the adjacent land."

The exception and reservation above referred to were in the words following: "Except and always reserved out of these presents and the direction, appointment, grant, and conveyance hereby made unto the said William Stott, his appointees, heirs, and assigns, all mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals lying within or under the said piece of land hereby appointed, granted, and conveyed, or any part or parts thereof respectively, with full liberty, power, and authority for the said William Stott, his appointees, heirs, and assigns, and his, their, or any of their lessees or agents and workmen, and every or any other person or persons, by his, their, or any of their order or permission at any time or times, and from time to time to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins, and seams of coal, cannel, and ironstone and other mines and minerals or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes, but without entering upon the surface of the said premises or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof."

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The indenture contained the following covenant: "That he, the said William Stott, his appointees, heirs, executors, administrators or assigns, will, from time to time, and at all times hereafter make and pay full and reasonable compensation (the amount thereof to be determined in case of difference by two indifferent arbitrators or their umpire, as in the ordinary case of settlement of disputes by arbitration) for all damage, spoil, injury, or loss that shall or may from time to time be sustained by the owner, tenant, or occupier, tenants, or occupiers for the time being of the lands hereinbefore expressed to be hereby appointed and granted or any part thereof, or of any erections or buildings for the time being thereupon for by reason in respect or in consequence of the searching for, getting, working, or carrying away any of the hereinbefore excepted mines, minerals, or substances lying within or under the same land or any part thereof."

The indenture also contained the following covenant by the company for themselves, their successors, and assigns: "And (the said company, &c.) also will and shall, within twelve calendar months from the date of these presents, erect, and at all times for ever afterwards maintain in good repair, upon the same piece or parcel of land, a substantial building, with proper outbuildings and appurtenances suitable for a cotton mill, and one or more messuages or dwelling houses, and that such buildings and appurtenances shall be built and maintained of good brick or stone or both, and with sound timber and materials, and in a workmanlike manner, and shall be roofed with slates or lead, and shall for ever thereafter be fairly worth to be let to a tenant or tenants at a rackrental of at least 150*l.* a year, and will and shall, within thirty-six calendar months from the date of these presents, furnish and supply the said building to be erected as aforesaid, as and for a cotton mill, and at all times afterwards keep the same furnished and supplied with sufficient steam-power and with mill-gearing and machinery of the most approved construction for spinning or manufacturing cotton."

A cotton mill and weaving shed were accordingly built by the company upon their land, together with gas-works, offices, and other buildings used in connection with the mill, and the whole was stocked with the usual machinery and apparatus necessary

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for the carrying on of the business of spinning and manufacturing cotton.

By an indenture of the 8th of September, 1863, William Stott conveyed to James Stott and his heirs, amongst other hereditaments, the portion of land which he had retained in his own possession, herein called "the adjacent land," and also all the mines, veins, and seams of coal, cannel, and ironstone and other mines and minerals, and all the marl and clay under the lands conveyed by the deed of the 31st of December, 1861, and also all the liberties, powers, and authorities which were excepted, reserved, limited, or granted to him, his appointees, heirs, and assigns, by that indenture, or expressed or intended so to be, and all and every the rights, privileges, estates, and interests, benefits, and advantages of or to which he was seised, possessed, or entitled in any manner howsoever under or by virtue of the same indenture, to hold the same lands, mines, minerals, and premises thereby granted and conveyed or expressed so to be unto the said James Stott and his heirs, subject to the covenants, agreements, and liabilities contained in the indenture dated the 31st day of December, 1861, and which by or on the part of the said William Stott, his appointees, heirs, executors, administrators, or assigns, were, or ought to be at any time or times, or from time to time thereafter observed, performed, fulfilled, or kept.

By an indenture of the 26th of July, 1871, James Stott conveyed to one of the defendants the land, mines, and minerals which were conveyed by the last-mentioned deed of the 8th of September, 1863.

In May, 1871, the company was voluntarily wound up, and the liquidators sold their land and the mill and premises to the plaintiff Henry Aspden. The sale was completed by an indenture dated the 11th of August, 1871, which contained a clause of exception and reservation similar to the clause set out above. The plaintiff, Henry Aspden, from the time that he so purchased the mill until the 10th of January, 1874, carried on the business of a spinner and manufacturer of cotton on the mill and premises.

In 1873 the plaintiff Henry Aspden mortgaged the mill and premises, and the mortgage subsequently became vested in the

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plaintiffs in the action of *Preston and Others* v. *Seddon and Another*.

After the 26th of July, 1871, the defendants (trading in partnership as "John Seddon & Co.") worked certain of the mines conveyed by the indenture of that date, and got coal lying under the land of the plaintiffs, and also coal lying under the adjacent land.

The plaintiffs allege (and for the purposes of this case it is admitted by the defendants) that, by reason of the defendants' workings under the plaintiffs' land, or by reason of their workings under the adjacent land, or by reason of their combined workings under both, the plaintiffs' land has subsided, and the mill and buildings have become ruinous and useless for the purpose of spinning and manufacturing cotton: and that, after several stoppages for repair, on the 10th of January, 1874, it became impossible, by reason of the subsidence, to continue to work the mill and machinery; and since that date the machinery has stood still, and the business of the plaintiff Henry Aspden has been stopped: and, further, that the security given to the mortgagees, plaintiffs in the second action, upon the mill and premises has been materially affected and diminished by such subsidence and by the condition of the mill and premises.

The defendants have always refused to pay any compensation for the damage done to the mill and premises, and have always denied their liability to do so.

On the 1st of January, 1874, the plaintiffs, Henry Aspden and his mortgagees, filed a bill in the Court of Chancery against the defendants to restrain them from working under or adjacent to the plaintiffs' land, and claimed damages and an account.

The defendants put in their answer, and the cause came on for hearing before the Master of the Rolls on the 16th of November, 1874, when a decree was made that the plaintiffs were not entitled to the relief claimed by their bill against the defendants or either of them, and it was ordered that all further proceedings should be stayed without prejudice to the right of the plaintiffs to bring an action at law for any damages they might have sustained by reason or in consequence of the defendants' workings in the bill

mentioned. The plaintiffs appealed to the Lords Justices, who affirmed the decision of the Master of the Rolls. (1)

The questions for the opinion of the Court were—

Whether, on the present or any amended pleadings, or on the facts found in the case, the plaintiffs in both actions or the plaintiff or plaintiffs in either of them, is or are entitled to recover compensation from the defendants for damage to the mill and premises occasioned—

(*a.*) By workings under the plaintiffs' land;

(*b.*) By workings under the adjacent land;

(*c.*) By combined workings under both.

(1.) All such workings being proper and according to the custom of the country?

(2.) All such workings being assumed to be improper and not according to the custom of the country?

And whether the plaintiff and plaintiffs, or either of them, are or is precluded by the decree and decision of the Court of Chancery from maintaining the actions or either of them?

May 1, 1876. *Herschell, Q.C.*, (*Gully*, with him), for the plaintiffs. In order to justify what they have done the defendants must rely on the provisions of the deed under which they have only a qualified right, and they cannot say they will exercise the right, but have nothing to do with the qualification. They must be taken to have done these acts on the terms that they will pay compensation, the only terms on which they can do them, and an action on the case will lie. Except they justify under the deed there is a clear cause of action for trespass. [He cited *Morland* v. *Cook*. (2)]

Crompton (*C. Russell, Q.C.*, and *Archibald Brown*, with him), for the defendants. There is no privity between the parties to these actions. The case resembles that of a covenant which does not run with the land—for this is an attempt to attach a burden to the land which is unknown to the law: Notes to *Spencer's Case* (3); *Keppell* v. *Bailey* (4); *Richards* v. *Harper*. (5)

(1) *Aspden* v. *Seddon*, Law Rep. 10 Ch. 394.

(2) Law Rep. 6 Eq. 252.

(3) 1 Sm. L. C. 7th Ed. p. 95.

(4) 2 My. & K. 517.

(5) Law Rep. 1 Ex. 199.

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Further, the judgment of the Master of the Rolls is conclusive against the plaintiffs, for if the right claimed by them existed at all it could have been enforced in equity: *Tulk* v. *Moxhay*. (1)

Herschell, Q.C., in reply.

May 2, 1876. BRAMWELL, B. There were two cases of *Aspden* v. *Seddon* and *Preston* v. *Seddon* argued before us yesterday, in which we will now give judgment. Our judgment is for the plaintiffs upon all the points. For my own part, I think, although the decision of these questions in the suit between the same parties in the Court of Chancery is a decision which is unfavourable to the plaintiffs there, it is in truth a decision in their favour here; because it seems to me that clearly there would have been an equitable remedy in Chancery if there had been none at law, that is to say, upon the authority of the case of *Tulk* v. *Moxhay* (1), and the others that followed on it, the defendants having taken their property with notice of a certain burden upon it, or with notice that it possessed a right with a burden attached to that right, would have been liable to the persons entitled to the benefit of that burden, even though there was no covenant that ran with the land. It seems to me, therefore, speaking with the reservation with which I always speak of equitable rights, that there would have been a remedy in the Court of equity if there had not been one at law; and I collect that that was the opinion of the Master of the Rolls and the Lords Justices; but they were of opinion that there was a right at law, and so am I. Consequently, they dismissed the bill there, holding that, as it was a claim for damages and there was a legal remedy, that claim should have been enforced in a Court of common law. I should mention that the proceedings in equity began before the coming into operation of the Judicature Act. We are under no difficulty as to the form of action, because the question put to us is, whether under any form of pleading (which, however, Mr. Herschell very properly said, was a form of pleading such as would be good at the time when the pleading took place (2)), the

(1) 2 Ph. 774.

(2) The action was brought and the pleadings were filed in 1875, before the Judicature Acts of 1873 and 1875 came into operation.

plaintiffs would be entitled to maintain these actions. I think they would.

The facts may be stated shortly thus: One Stott was the owner in fee of the whole of the property which is in question here. He granted the surface of a portion of the property to those under whom the plaintiffs claim. He reserved the mines to himself, that is to say, he did not grant them. In that state of things there was a severance of the ownership of the surface and of the mines underneath. Now I deal for the present with the questions that arise with respect to the surface and the mines underneath that portion of the property. In that condition of things, if nothing else had taken place he would have been bound so to take his coal, if he took it at all, as not to injure the surface. But at the same time that the conveyance was made the grantees of the surface did that which for the purposes of this question would make it the same as though it had been done fifty years afterwards. Suppose it had been done fifty years afterwards, it would have been this: the owner of the surface I will say—I will suppose the two estates to be effectually severed—granted to the owner of the subjacent mines a right to take the whole of the coal and minerals underneath, though in so doing the surface and what was on it should be let down, but he granted that right, and he gave that licence, so that compensation in money be made by the grantee or his assigns for all damage that should be done in the exercise of what are called the excepted liberties, or in consequence thereof. The defendant is an assignee of the mines, and he has under and by virtue professedly—because, unless it is so, it is a tortious act on his part—of that licence so granted to him, worked his mines in such a way as to let down the plaintiffs' surface.

Then the plaintiffs say, You having exercised the licence which was coupled with—I do not know whether "condition" is the right word; condition-precedent certainly is not, because the right to the compensation does not accrue till after the act has been done and mischief has resulted from it;—with that corresponding duty on your part, you having exercised that right subject to that obligation on your part, or to that condition, whichever is the right word —must now make me compensation. This the defendants have refused to do. It really does seem to me plain that they are bound

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to make that compensation, and it is a compensation the ascertainment of which is provided for, that is to say, it is compensation which is to be agreed upon between them, or if they dispute it is to be ascertained by arbitrators. If the defendants will not appoint an arbitrator, the result is that they are liable to an action, because they have failed to do that duty which they in my judgment took upon themselves to do when they exercised that licence. I have a strong opinion upon the utter unreasonableness of what would be the law if it were not what we are pronouncing it to be. It certainly is a very strange thing indeed that no case could be found which could be said to bear upon it.

I do not know that one could gain much by putting examples, but I put this case to Mr. Crompton, who argued for the defendants: if a right of way be granted, the grantee paying a penny for each time of user,—and in order that no difficulty be made about it, we will say such payments to be made quarterly or yearly,—the grantee cannot be challenged for trespass, because he could shew the grant of the right of way. Is there to be no remedy for the agreed price of the user? It seems to me impossible that that could be so. Take another case, the grant of a right to erect a dam which would turn the water back to the grantor's premises, upon the terms of making compensation for any damage that might result. If the common law gave no remedy in such a case as that against the person who would—unless he availed himself of this conditional licence, or this licence accompanied with an obligation on the part of the person using it—be the actual wrongdoer, it seems to me it would be much more defective than I have been accustomed to consider it ever since I have had acquaintance with it. Whether the correct form of action would be assumpsit, or an action on the case, I think it is unnecessary to consider. For aught I know, it may be that the remedy is in tort, though I think not on the ground that the defendant, by not paying the compensation, as it were, defeated his licence; but, fortunately, as I said before, we are not dealing with the question as to how the plaintiff should declare; it is enough for us to say, as we do, that in this case there is a remedy at common law for the compensation stipulated to be paid when the licence is exercised.

I have limited my observations at the present moment to the

case of the subjacent mining, but another question arises in this way; the grantor of the land to those under whom the plaintiffs claim was also the owner of adjacent land not included in the grant, and a question is put to us whether, if the plaintiffs' premises were injured by working in the adjacent land, they have any right of action against the defendants. Now the case is somewhat curious. The grantor of the land to those under whom the plaintiffs claim stipulated that, for securing the rent-charge which he took as the consideration for the grant, the grantees should build on it a substantial building, and they did build on it a substantial building. There is no covenant on the one hand by the grantor that he will not work the adjacent land so as to injure that building, and there is no licence to him to work it injuring the building, and consequently there is no provision as there is in the other matters I have mentioned, that if he does injure it he must make compensation for it. I am very much inclined to think that there is here what one may call a compensation of errors, that is, it is very likely that the grantor, Stott, would, if he had thought of it, have reserved to himself the right to work under the adjacent land in the same way as he reserved, or caused to be granted to him, I ought more technically to say, the right to work in the subjacent mines. But then it is more than probable that if he had claimed to do that, and at the same time stipulated for the erection of this building, the grantees of the land on which the building was to be built would have claimed and have introduced into the deed an obligation on his part to compensate them, just in the same way as in the case of working the subjacent strata. Of course we must not decide the case upon the footing that two mistakes have been made, but we must take it upon the materials with which the parties have furnished us and the agreement actually come to. It seems to me, under these circumstances, quite certain that if no building had been put by the plaintiffs or those under whom they claimed upon their land, and the defendants had so worked their mines in the adjacent land as to cause the surface of the plaintiffs' land to fall in, in that case the plaintiffs would have been entitled to maintain an action against them. The plaintiffs certainly would be entitled to recover if the defendants' mines in the adjacent land had been so worked

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that the plaintiffs' land would have come down whether there was a house there or not. But further than that, I think that even if the plaintiffs' land would not have come down without the additional weight of the house, they are entitled to maintain this action; and for this reason: when Stott granted the surface to the grantees under whom the plaintiffs claim, with the stipulation that those grantees should build on that land, then by the application of the doctrine of the disposition of the owner of two tenements, he, by implication, granted to the grantees that he would so use his adjacent land that the house which the grantees were to build should not be let down by his operations upon it. Therefore it seems to me, on that ground, the plaintiffs are entitled to say, You have taken your land with the burden of so using it that the house that we build on our land should stand; in other words, we have an easement against you, not only for the natural support of land unbuilt upon, but for support to build upon land.

I think, therefore, that the plaintiffs are entitled to recover for any damage that may have been done to the mill upon two grounds: first, if in fact the land has not been so burdened that the house has come down in consequence, they would be entitled to maintain the action; but even supposing it is extra burdened, and the ground has come down in consequence, then I think they are entitled under that law of the disposition of the owner of two tenements. The result is, therefore, that I think they are entitled to maintain their action against the defendants for damage to the mill and premises occasioned by the workings under their land, by the workings under the plaintiffs' land, and certainly as a consequence by combined workings under both, all workings being proper and in accordance with the custom of the country.

The second question assumes the working not according to the custom, but Mr. Herschell said he should not rely on that, therefore it is not necessary to express an opinion upon it.

The third question is, whether the plaintiff and plaintiffs, or either of them, are or is precluded by the decree and decision of the Court of Chancery from maintaining the actions, or either of them, and the ground of that was that the defendants said it was res judicata. I am of opinion that it really is not. If there was any res judicata at all, it was that they could maintain an action.

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Therefore I answer that in favour of the plaintiffs also. On these grounds I think our judgment should be altogether for the plaintiffs.

CLEASBY, B. I am of the same opinion. I think the action is maintainable to recover compensation for injury to buildings by the working of the subjacent mines. I shall confine my judgment to that which is the main question, and adopt entirely what has been said by my learned Brother upon those other questions, which are not of so much importance. One person is the owner of the surface, another is the owner of the mines. Sometimes there is a difficulty from not knowing exactly how they became separated and what the state of circumstances was, but here we know exactly. I do not think it would be argued that it makes any difference that the same person, being the owner of both, grants away the surface, reserving the minerals, or being the owner of both, reserves the surface and grants the minerals. He grants the minerals subject to this, that in case the minerals are worked, compensation shall be made for injury to the buildings that it is intended shall be erected upon the land; and it appears to me that under those circumstances, if the grantee of the minerals entered, searched for mines, and did injury to the buildings, he would be liable. If he sold the minerals, and the person to whom he sold them continued the search, and continued the working of the minerals, and continued to injure the building, he would be liable; and so, again, as long as any person, possessed of the minerals by the same title as the grantee, exercised the right—which he must be taken to do rightfully, not wrongfully—of searching for minerals, and produced the result contemplated by the grantee of the minerals, each would be responsible successively for the injury he did. I adopt the reasons given by my learned Brother. It is remarkable that we have not had a reference to any authority upon this subject. It could not be treated as a covenant, and therefore as a matter running with any title, but only as a liability. To see how an action at law could be maintained, I have been referring to Viner's Abridgment. There, under Debt C., placitum 8, is a reference to a case in the 7th volume of the Reports, which, although not the same,

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I think presents a very close analogy. It is *Lillingston's Case.* (1) It was resolved that, "Where a man grants a rent-charge for life, and the rent is in arrear, and the grantor,"—that is, the person seised of the land,—"enfeoffs A. of the lands, and the rent-charge is in arrear in the time of A., and then A. enfeoffs B., and the rent-charge is in arrear in his time, and then the grantee of the rent-charge dies, his executor shall have an action of debt against every one of them for the rent which was in arrear respectively in their times;" and the reason given is a very excellent one, certainly equally applicable to this case, for the only reason given is, "for qui sentit commodum sentire debet et onus." Thus there is no liability arising out of contract; the only liability arises out of this, that the man has enjoyed the land. That is where I say it is only an analogy, not a case in point, because the man has enjoyed the land, and during the time that he has enjoyed it a certain liability and risk in respect of it have accrued. Then the law says, You ought to bear the burden because you have enjoyed the land. There is no necessity imposed, it is not a burden in that sense, it is optional with him whether he exercises the right or not. It makes no difference whether it is mines or land. During the time that you have enjoyed the land this burden, one may say, came into existence; that is, the yearly rent has become due. Here you have enjoyed these mines, you have enjoyed this licence. During the time that you enjoyed it this burden—that is, this obligation to make compensation for what you have done—has come into existence. I think, therefore, our judgment ought to be for the plaintiffs.

Judgment for the plaintiffs.

Against this judgment the defendants appealed.

1876. June 21. *Manisty, Q.C.*, and *Archibald Brown* (*Crompton* with them), for the defendants, contended that the judgment of the Exchequer Division was wrong.

Herschell, Q.C., and *Gully*, for the plaintiffs, contrà.

JAMES, L.J. Unless the authorities compel me to decide differently from the judgment of the Court below, I should not be

(1) 7 Co. Rep. 39 b.

much disposed to hold that the law of England can be in such a state that the defendants could be authorized to commit a trespass in opening a mine, and should justify doing so under an authority in which there is a qualification, but should refuse to pay anything in the way of compensation under the terms of that qualification. The grantor here said, "I reserve to myself, my heirs, appointees, and assigns, the right of taking the minerals which are supporting your house, I and they paying all compensation." The law seems to me plain that a man exercising the right is to pay the compensation. There is no new charge created by the plaintiffs, the simple thing is that the man who has exercised the right is to pay for the damage. The law is so, and I think that it ought to be so.

MELLISH, L.J. I am of the same opinion. It is certainly rather remarkable that there should be no direct authority either for or against the right to maintain an action of this description. I have no doubt it is a well-known principle of law that you cannot annex to land a burthen which is unknown to the law, that is, have a sort of burthen of your own and annex it to the land and make it run with the land from one owner to another. That is a thing which cannot be done. Nothing can be annexed to the land, except a well-known legal interest of the owner of which the law takes notice. The right here is simply a right on the part of the owner of the minerals to get all the minerals so as to let down the surface. I think it does not make the least difference whether the separation of the surface and the minerals has taken place by the man who was owner of both granting away the surface, or whether it takes place by the man who was owner of both granting away the minerals. In the one case it is a reservation no doubt, and in the other a grant. Then the next thing is, can you annex this condition to that grant, and give a right to let down the surface subject to the condition? I think they may say, "You shall let down the surface, but you shall only do that sub modo that the man, whoever does let down the surface by getting minerals, shall pay compensation." I presume that ever since the ownership of the surface and the minerals has been separated, it has been the common practice to make it

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part of the conditions, that if the surface is let down compensation shall be paid. I think very numerous cases may be found where it has been proved as a custom from time immemorial for the lord of the manor to be at liberty to get the coal in copyhold tenements, paying compensation for the damage which he may cause by getting it. Sometimes the custom is that the copyholder gets it, or if there is no custom at all, neither party can get it; but I apprehend there may be a well-known and perfectly legal custom that the lord of the manor may get all minerals under the copyhold lands, paying compensation to a copyhold tenant for any damage he may do in respect of the surface in getting them. Inclosure Acts constantly give the same right. That being a perfectly well-known right, and existing and binding, in the absence of direct authority to the contrary, we should do very wrong if we held that the right claimed in this case did not exist. It does not impose any unusual burthen. I think it would be most unjust that the owner of the minerals, having got them under the express terms that he should not let down the support to the surface, should get the minerals and let down the buildings, and not pay compensation for doing so. I am of opinion that the judgment of the Court below should be affirmed.

BAGGALLAY, J.A., and QUAIN, J., concurred.

Judgment for the plaintiffs affirmed.

Solicitors for plaintiffs: *Pritchard, Englefield, & Co., for Charles Costeker, Over Darwen.*

Solicitors for defendants: *Sharpe, Parkers, & Co., for Taylor & Rowbottom, Wigan.*

ROCHFORT *v.* ATHERLEY.

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Aug. 8.

Local Board—Acting as Member after Disqualification—"Party aggrieved"—Consent of Attorney General to Action for Penalty—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *and sch.* 2, *rule* 70.

By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that Act shall not be "taken by any person other than by a party aggrieved," or by a local authority, without the consent of the Attorney General; and by sch. 2, r. 70, a penalty of 50*l.* is imposed upon any person acting as member of a local board without qualification. The defendant, who was acting as chairman of a local board after disqualification, made a complaint to the members thereof as to certain conduct of the plaintiff, who was clerk to the board; the plaintiff, fearing that he might be dismissed from his office, resigned it, and sued the defendant to recover a penalty of 50*l.* for acting without qualification:—

Held, that the plaintiff was not "a party aggrieved," within the meaning of the Public Health Act, 1875, s. 253, and that he could not sue for the penalty without the consent of the Attorney General.

THE following were the material portions of the statement of claim herein:—

The plaintiff was clerk to the Local Board of Shanklin in the Isle of Wight, and received in that office a salary of 50*l.* per annum. The defendant, in the month of August, 1874, was elected a member of the local board and was appointed chairman; but subsequently to his election he became disqualified to be a member by reason of non-residence in August and September, 1874, and August and September, 1875. A meeting of ratepayers having been held at Shanklin in January, 1874, the defendant publicly stated that he had caused notice of it to be given to Captain Harvey: this was denied by the plaintiff, and was in fact untrue.

Par. 7. "On the 7th day of March, 1876, a meeting of the said local board was duly held and was attended by the defendant as a member and chairman thereof, and the defendant as a member thereof complained to the said local board of the conduct of the plaintiff in making such denial, and otherwise in respect of such question, and declared his intention of resigning the chairmanship of such local board if the plaintiff was permitted to continue to

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hold the office of clerk thereof, and the defendant pressed the said local board to dismiss summarily the plaintiff from such office."

"8. A discussion thereupon followed, and from such discussion the plaintiff believed that a majority of the members of the said local board under the personal influence of the defendant, were prepared to dismiss him summarily from such office of clerk; and in order to avoid the discredit of such dismissal, the plaintiff then and there tendered his resignation of such office, and his resignation was accepted by the said local board. Throughout the said meeting the defendant acted as member and chairman of the said local board."

"9. By the aforesaid act of the defendant, done as a member of the said local board, subsequently to his ceasing to hold his qualification as aforesaid, the plaintiff has been seriously aggrieved and has lost an office worth 50*l.* per annum."

The statement of claim also charged the defendant with slander. The plaintiff claimed "50*l.* for penalty under the statute 11 & 12 Vict. c. 63, s. 19, or under rule 70, schedule 2, of the Public Health Act, 1875," and also damages for slander. It was not alleged that the consent of the Attorney General had been obtained to the claim for the penalty.

A summons was taken out at chambers, to shew cause why so much of the statement of claim as related to the claim for penalty should not be struck out or proceedings thereon stayed, on the ground that the leave of the Attorney General had not been obtained; and Pollock, B., ordered, on appeal from a master, that it should be struck out.

The plaintiff gave notice of motion to discharge the order of Pollock, B.

R. V. Williams, and *Castle*, for the plaintiff. It is submitted that the plaintiff is "a party aggrieved" within the meaning of the Public Health Act, 1875, s. 253. (1) Owing to the conduct of

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253, "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority . . . . without the consent in writing of the Attorney General."

By sch. 2, rule 70, "Any person who, not being duly qualified to act as member of the local board, or not

the defendant whilst acting as chairman after disqualification, the plaintiff has been deprived of a valuable office.

[QUAIN, J. I am at a loss to see what personal grievance the plaintiff suffered.]

The complaint mentioned in the seventh paragraph was a personal grievance; for it was a matter which naturally would result in the dismissal of the plaintiff from the clerkship; and by the express terms of the Public Health Act, 1875, sch. 1, r. 70, the acts of the defendant, although he was disqualified, were valid. Moreover, the members of the local board would be much influenced by a complaint emanating from their acting chairman, and would be inclined to take an adverse view of the plaintiff's conduct. This case is plainly distinguishable from *Boyce* v. *Higgins* (1) and *Hollis* v. *Marshall* (2): for in the former case the plaintiff had no greater grievance than the rest of the public, and in the latter his only ground of complaint was the loss of an election. Further, the plaintiff ought not to be summarily deprived of the power of laying his case before a jury.

C. S. C. Bowen was not called upon to argue for the defendant.

MELLOR, J. In my judgment the order of my Brother Pollock was quite right. I do not think that the plaintiff has sustained any grievance. The local board did not pass a resolution to dismiss him; and he anticipated their determination by resigning his office. If we were to decide that the plaintiff is "a party aggrieved," we should in effect hold that every person who, from a nervous temperament, fancies himself in jeopardy, and does an act mischievous to himself, is aggrieved by the person from whom he

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having made and subscribed the declaration required of him by this Act, or being disabled from acting by any provision of this Act, acts as such member, shall be liable to a penalty of fifty pounds, which may be recovered by any person, with full costs of suit, by action of debt. . . . . But all acts and proceedings of any person disqualified, disabled, or not duly qualified, or who has not made and subscribed the declaration required by this Act, shall, if done previously to the recovery of the penalty mentioned in this Act, be valid and effectual for all intents and purposes."

(1) 14 C. B. 1; 23 L. J. (C.P.) 5.

(2) 2 H. & N. 755; 27 L. J. (Ex.) 235.

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apprehends future injury. The consent of the Attorney General was necessary.

QUAIN, J. I also think the order of my Brother Pollock right. We are doing the plaintiff no injury by acting under the summary procedure of the Court, for if our decision is erroneous he can appeal against it. I agree with my Brother Mellor that the plaintiff is not a "party aggrieved" within the meaning of the statute. He resigned his office, and did that which he thought the best course to take for himself.

Appeal dismissed.

Solicitors for plaintiff: *William Elgood, for Mew & Hooper, Newport, Isle of Wight.*

Solicitors for defendant: *J. & F. Needham, for Urry, Ventnor.*

June 23.

[IN THE COURT OF APPEAL.]

THE TOTTENHAM LOCAL BOARD OF HEALTH *v.* ROWELL.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 129—*Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *s.* 24—11 & 12 *Vict. c.* 43, *s.* 11—*Expense of sewering and paving Street—Limitation as to Proceedings in County Court.*

By the Public Health Act, 1848, s. 69, the local board might require the owners of premises fronting or abutting upon any street to sewer and pave the same, and upon default might themselves execute the work; and the expenses incurred by them were to be paid by the owners in default, and might be recovered in a summary manner. By s. 129 summary proceedings were to be taken before two justices. By the Local Government Act (1858) Amendment Act, 1861, s. 24, proceedings for the recovery of demands below 20*l.*, which local boards were empowered to recover in a summary manner, might at the option of the local board be taken in the county court. By 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making a complaint before justices, it must be made within six months from the time when the matter thereof arose.

The plaintiffs, under the Public Health Act, 1848, s. 69, incurred expenses in sewering and paving a street, upon which premises belonging to R. abutted; his proportion of the expenses amounted to 13*l.* 5*s.* 5*d.* On the 18th of February, 1873, notice was served by the plaintiffs on R. that the foregoing amount was apportioned upon him, and that the same would become payable by him, unless within three months he disputed it. R. did not dispute the apportionment.

The money not having been paid, on the 8th of June, 1875, a plaint was issued by the plaintiffs in a county court to recover it from the defendant, as R.'s executor:—

Held, that the limitation of time mentioned in s. 11 of 11 & 12 Vict. c. 43, applied as well to proceedings in county courts as to proceedings before justices, and that the action could not be sustained, it having been brought more than six months after the expiration of the three months allowed for disputing the amount apportioned upon R.

APPEAL from the decision of the judge of the County Court of Middlesex, holden at Edmonton, in favour of the plaintiffs.

This was an action brought to recover 13*l.* 5*s.*, with interest at 5 per cent. until payment.

The plaint was entered on the 8th of June, 1875. The defendant's testator, M. Rowell, was the owner of certain premises fronting and abutting on a street called Nightingale Road, in the parish of Tottenham.

In 1864, certain streets, and amongst them the street on which the testator's property fronted or abutted, were not properly sewered, levelled, paved, flagged, or channelled; and the plaintiffs, on the 25th of October, 1864, caused to be served a notice on the occupiers and owners of the several streets, and amongst them on the testator, to sewer, level, channel, and repair the same. None of the owners or occupiers complied with the notice, and the plaintiffs, in the early part of 1865, executed the works. The surveyor of the plaintiffs apportioned the expenses amongst the owners and occupiers, and a notice of the apportionment was duly served upon the testator on the 18th of February, 1873, stating the amount payable by him to be 13*l.* 5*s.* 5*d.*, and informing him that, unless within the expiration of three months from the service of the notice he should dispute the apportionment, it would be conclusive upon him. (1) The testator did not dispute the apportionment, and after the lapse of three months a demand of payment was served upon him.

The question was whether the action was maintainable against the defendant as executor of Mr. Rowell.

Feb. 10. In the Court of Appeal from Inferior Courts.

(1) Pursuant to the Local Government Act, 1858 (21 & 22 Vict. c. 58), s. 63.

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Brown, Q.C. (*R. E. Webster* with him), for the plaintiffs.
L. Kelly, for the defendant.

THE COURT (Cleasby, B., and Field, J.), gave judgment for the defendant, on the ground that the claim of the plaintiffs having accrued more than six months before the commencement of the action, *West Ham Local Board* v. *Maddams* (1) was an authority for holding the action not to be maintainable.

June 22, 23. On appeal.

Brown, Q.C., and *R. E. Webster*, for the plaintiffs. The question is whether the limitation of six months in 11 & 12 Vict. c. 43, s. 11 (2), applies to proceedings by local boards in a county court,

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(1) Queen's Bench Division. January 22, 1876. *The West Ham Local Board* v. *Maddams.*

APPEAL from the County Court of Middlesex. The action was brought by the local board for the defendant's proportion of the cost of sewering, paving, &c., a street on which her land and premises abutted within the meaning of the Public Health Act (11 & 12 Vict. c. 63, s. 69). The defendant's proportion was settled in September, 1865, and the action brought in May, 1875.

Day, Q.C. (*W. G. Harrison* with him), for the plaintiffs, argued that although under 11 & 12 Vict. c. 43, s. 11, the local board could not have proceeded before justices after six months from the cause of complaint, yet that the option given by 24 & 25 Vict. c. 61, s. 24, where the demand was under 20*l.*, to proceed in the county court was not subject to the same limitation.

Grantham, for the defendant, was not heard.

THE COURT (Blackburn and Field, JJ.), were clearly of opinion that the six months' limitation applied to all such proceedings whether before justices or in the county court.

(2) 11 & 12 Vict. c. 43, is intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales with respect to summary convictions and orders," and by s. 11 enacts "that in all cases where no time is already or shall hereafter be specially limited for making any such complaint (i.e. a complaint upon which an order for the payment of money or otherwise can be made) or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, "In case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may by notice in writing to the respective

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By s. 129 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), recovery in a summary manner means recovery before two justices, and in that case the limitation of six months applies. By s. 24 of 24 & 25 Vict. c. 61, demands below 20*l.* shall be recovered in a county court, as if they were debts within the cognizance of the Court. The effect of this is, where a local board sue in a county court to recover money payable to them, the proceeding has attached to it all the incidents of an action of debt, and therefore the limitation of six years and not of six months is applicable.

Manisty, Q.C., and *Kelly*, for the defendant. The argument for the plaintiffs involves the absurdity that a demand below 20*l.* may be recovered in a county court at any time within six years; but a demand above that sum, which can be enforced only before two justices, is recoverable only within six months. The

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owners or occupiers of the premises fronting, adjoining, or abutting upon such part thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

Sect. 129: "In all cases in which the amount of any damages, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices."

By the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 24, "proceedings for recovery of demands below 20*l.*, which local boards are now empowered by law to recover in a summary manner, may at the option of the local board be taken in the county court as if such demands were debts within the cognizance of such courts."

11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, are repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343; but s. 261 of the last-named statute re-enacts 24 & 25 Vict. c. 61, s. 24, the jurisdiction of county courts being extended to demands below 50*l.*

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proper construction is that, by the earlier Act the demands of local boards must have been recovered within six months before justices, and by the later Act an option is given to go to the county court, but under the same restrictions. *West Ham Local Board* v. *Maddams* (1) is a clear authority for the defendant.

[MELLISH, L.J. The words of s. 24 of 24 & 25 Vict. c. 61, are, "may at the option of the local board be taken in the county court:" that is, as long as the local board have power to go before the justices they may go before the county court; but when the power to go before justices has gone the jurisdiction of the county court is at an end.

QUAIN, J. The remedy is given only "at the option"; after the six months have elapsed, the power to apply to justices is determined, and no option then exists.]

Brown, Q.C., in reply. The option means that the local board may go before justices in six months, or proceed in the county court within six years.

JAMES, L.J. I am of opinion that the decision of the Court below ought to be affirmed. The point argued was considered and decided in the Queen's Bench Division in *West Ham Local Board* v. *Maddams*. (1) It was there determined that the limitation of six months applied to proceedings in the county court as well as to proceedings before justices, and in my opinion the decision was right. Upon the true construction of the Act the plaintiffs' claim is barred. The first intention was that the claim by local boards should be recovered in a summary manner before justices within six months, and by one of the provisions in a subsequent Act an option is given to proceed in the county court. So long as the claim can be enforced before justices it may be sued for in the county court: but when the six months have gone by the jurisdiction of justices is clearly at an end, and therefore no alternative remedy can exist.

MELLISH, L.J. I am of the same opinion. The true construction of s. 24 of 24 & 25 Vict. c. 61, appears to me to be this. Be-

(1) See note (1), p. 516.

fore the passing of that Act these expenses were recoverable before two justices within six months and not afterwards. That was the state of the law. The jurisdiction of justices was not confined to 20*l.* Then the legislature passed this section. It is quite impossible to suppose that the intention of the legislature was that claims under 20*l.* should be recoverable after the lapse of six months by suing in the county court, while amounts above 20*l.*, being recoverable only before justices, can be proceeded for only within that time. We ought not to construe this section in this manner, which certainly seems unreasonable. What the legislature said was that proceedings for demands below 20*l.* might, at the option of the local board, be taken in the county court. It is right to construe these words as meaning that, as long as the right to proceed before justices existed, the right to sue in the county court remained, for then an option might be exercised by the local board. But when the six months had elapsed the right to proceed before justices was gone, and therefore no option could be exercised and the right to sue in the county court was at an end.

BAGGALLAY, J.A., and QUAIN, J., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Heath & Parker.*
Solicitors for defendant: *Peckham, Maitland, & Peckham.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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In the Second Series,
1 Q. B. D. 1 Ex. D.
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ARTICLES OF ASSOCIATION—*continued.*
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CHEQUE—*Banker's Cheque—Alteration of Date—Materiality.*] A person intrusted with a cheque by the payee to pay into a bank absconded with it, and after altering the date from the 2nd of March to the 26th of March, passed it to the plaintiff for value. The cheque was not paid, and the plaintiff, who had not been guilty of any negligence in taking the cheque, sued the drawer:—*Held*, that the alteration was material, and invalidated the cheque; and that the circumstance that the plaintiff had not been guilty of negligence in taking it was immaterial. VANCE *v.* LOWTHER [176

2. —— *Banker and Customer—Payment of crossed Cheque to wrong Bankers—Forged Indorsement—Ratification by Customer of Banker's unauthorized Payment—Money had and received.*] The plaintiff drew a cheque on his bankers, M. & Co., payable to order, crossed it, "L. & C. Bank," and sent it for value to the payee, from whom it was stolen and his indorsement forged. It was ultimately passed to the defendant, who took it bonâ fide in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the L. and J. Bank presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing "L. & C. Bank." On hearing it was paid the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second cheque for the same amount, which also was paid by M. & Co., and the plaintiff's account was debited with both cheques. The plaintiff having brought an action for the amount of the first cheque, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first cheque:—*Held*, that the first cheque had been paid by M. & Co. improperly and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant, who had acquired no title to the cheque. BOBBETT *v.* PINKETT - 368

COMPANY—Articles of association - 20, C. A. 88
See ARTICLES OF ASSOCIATION.

—— Foreign—Jurisdiction - - C. A. 17
See FOREIGN JUDGMENT.

—— Residence—Income tax - - 428
See INCOME TAX.

COMPENSATION—Game—Arbitration clause
See ARBITRATION CLAUSE. [C. A. 257

—— Minerals—Damage to surface - C. A. 496
See SUPPORT.

CONSTABLE—Arrest—Warrant - - 352
See WARRANT OF ARREST.

CONTRACT—Alteration—Cheque - - 176
See CHEQUE. 1.

—— Broker—Sold-note - - C. A. 357
See CONTRACT BY AGENT.

—— Construction—Arbitration clause C. A. 257
See ARBITRATION CLAUSE.

—— Illegal consideration - - - 5
See ILLEGAL CONSIDERATION.

CONTRACT BY AGENT—*Principal and Agent—Sale of Goods—Broker making Sold-note "on Account of" foreign Principal—Personal Liability of Broker.*] Fruit brokers in Liverpool gave a fruit merchant the following sold-note:—"We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges, of the brand James Morand & Co., at 12*s.* 9*d.* per case free on board, ..." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:—*Held*, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co." shewed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not

CONTRACT BY AGENT—*continued.*
liable upon the contract. *Paice* v. *Walker* (Law Rep. 5 Ex. 173) commented on. GADD *v.* HOUGHTON - - - - C. A. 357

CONVICTION—Gaming—Procedure - 320
See GAMING.

—— Nuisance—Double conviction - 67
See SMOKE. 1.

COSTS—Notice of motion - - - 53
See NOTICE OF MOTION.

COUNTY COURT—Action sent from Superior Court - - - - - 48
See COUNTY COURT JURISDICTION. 1.

—— Appeal—Leave to move - D. C. A. 425
See COUNTY COURT APPEAL. 2.

—— Appeal—Question of fact - D. C. A. 404
See COUNTY COURT APPEAL. 1.

—— Jurisdiction—Ejectment - - 416
See COUNTY COURT JURISDICTION. 2.

—— Paving expenses—Limitation of time
See REPAIR OF ROAD. 5. [C. A. 514

COUNTY COURTS ACT, 1850, s. 22 - - 416
See COUNTY COURT JURISDICTION. 2.

COUNTY COURTS ACT, 1867, s. 6 - 404
See COUNTY COURT APPEAL.

—— **s. 7** - - - - - - 48
See COUNTY COURT JURISDICTION. 1.

—— **ss. 11, 14** - - - - 416
See COUNTY COURT JURISDICTION. 2.

COUNTY COURTS ACT, 1875, s. 6 - - 404
See COUNTY COURT APPEAL.

COUNTY COURT APPEAL—*Suit within Common Law Jurisdiction—Question of Fact—Verdict of Judge sitting without Jury—Motion for New Trial on Ground that Verdict was against the Weight of Evidence—County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6.] The Court of Appeal from Inferior Courts has no power under 38 & 39 Vict. c. 50, s. 6, to review the decision of the judge of a county court upon a question of fact arising in a suit brought within its jurisdiction as a court of common law. COUSINS *v.* THE LOMBARD DEPOSIT BANK - - - - - D. C. A. 404

2. —— *Practice—Order giving Leave to appeal made by Judge at Chambers on a Day when this Court sits—County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6.] A judge of the High Court of Justice, sitting at chambers, has no power to make, on a day when the Court of Appeal from Inferior Courts sits, an order to shew cause why the judgment given in a cause in a county court should not be set aside. When an appeal from a county court is struck out on the ground that the order giving leave to appeal has been granted by a judge at chambers without jurisdiction, the Court of Appeal from Inferior Courts has no power to grant costs to the party who appears to shew cause against it. BROWN *v.* SHAW - D. C. A. 425

COUNTY COURT JURISDICTION — *Action in Superior Court—Claim reduced by Payment below* 50*l.—Payment after Action brought—County Court Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 7.] The power given to a defendant under the County Court Act, 1867, to apply to have a case tried in a county court where the claim indorsed on the writ exceeds 5*0l.*, but such claim has been reduced by payment to a sum not exceeding 50*l.*, does not apply where the payment is made after action. OSBORNE *v.* HOMBURG - - - - 48

2. —— *Action of Ejectment—Prohibition on Ground that Hereditaments of greater annual Value than* 20*l.—Effect of Decision by Judge of Superior Court that Cause within Jurisdiction of County Court—Res judicata—County Courts Act*, 1850 (13 & 14 *Vict. c.* 61), *s.* 22—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *ss.* 11, 14.] The plaintiff having sued in a county court to recover possession of certain hereditaments, the defendant applied by summons to a judge of the High Court of Justice sitting at chambers for a prohibition, on the ground that the annual value thereof was greater than 20*l.*; the judge dismissed the summons, and the defendant did not appeal from his decision. At the trial of the action the judge of the county court refused to receive evidence from the defendant that the hereditaments were of greater value than 20*l.* a year, and he gave judgment for the plaintiff:—*Held*, that the decision of the judge of the county court was right; for by the dismissal of the summons the value of the hereditaments was conclusively ascertained for the purposes of the action, which therefore must be assumed to be within his jurisdiction. SYMONS *v.* REES - - - - - D. C. A. 416

COUNTY VOTERS REGISTRATION ACT, 1865, s. 16 - - - - - 376
See REVISING BARRISTER.

COVENANT NOT TO AFFECT LICENCE—*Landlord and Tenant—Covenant not to do or permit any Act that can or may affect, lessen, or make void Public-house Licences—Conviction of Lessee—Forfeiture—Licensing Acts*, 1872 *and* 1874 (35 & 36 *Vict. c.* 94, *and* 37 & 38 *Vict. c.* 49.] By a lease of a public-house made after the Licensing Act, 1874, came into operation, the lessee covenanted not to "do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licences for the time being granted to the public-house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day three offences against the Licensing Acts of 1872 and 1874, was convicted of two of them by justices, who directed, under the Act of 1874, s. 13, that the convictions should not be recorded on any of the lessee's licences. The lessor having brought an action against the lessee to recover possession of the public-house on the ground of forfeiture, and for damages for breach of covenant:—*Held*, affirming the judgment of the Exchequer Division, that the licences were not "affected" within the meaning of the covenant, and that there was no breach of covenant. WOOLER *v.* KNOTT - - - - C. A. 265.

CROSSED CHEQUE—Banker - - 368
See CHEQUE. 2.

CUSTOM—Dancing—Maypole - - 1
See CUSTOM TO DANCE.

CUSTOM TO DANCE—*Custom—Claim by Inhabitants to Recreation in Another's Freehold.*] A custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a may-

CUSTOM TO DANCE—*continued.*
pole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, is good. Hall *v.* Nottingham - - - 1

DAMAGES—Remoteness—Detention of ship 60
See Demurrage.

DEFAMATION—Slander—Damage - 91
See Slander.

DEMURRAGE—*Ship—Charterparty—Breach of Contract—Damages—Proximate Cause.*] The defendant chartered the plaintiff's ship upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but owing to the defendant's default was not ready when her turn came, and was consequently detained eleven days. When her turn came round again she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently detained three days. The plaintiff having sued on the charterparty claiming damages for the detention :—*Held*, that the detention for the three days was the legal and natural consequence of the defendant's default in not having the ship ready for the first turn and that the plaintiff was entitled to damages in respect of the three days as well as the eleven days. Jones *v.* Adamson 60

DESCRIPTION OF WITNESS—Bill of sale 364
See Affidavit with Bill of Sale.

DETENTION OF GOODS—Magistrate's order 172
See Estoppel by Judgment. 1.

DILAPIDATIONS — *Ecclesiastical Dilapidations Act*, 1871 (34 & 35 *Vict. c.* 43), *ss.* 29, 53—*Avoidance of Benefice — Time for Surveyor to make his Inspection and Report.*] Within three calendar months after the avoidance of a benefice by resignation the bishop of the diocese directed the surveyor to inspect the buildings which were out of repair. After the expiration of the three months the surveyor inspected and reported to the bishop, who thereupon, under the Ecclesiastical Dilapidations Act, 1871, made an order for the cost of the repairs. The new incumbent having brought an action upon the order against the late incumbent, the latter pleaded that the surveyor neither inspected nor reported within the three months limited by s. 29 :—*Held*, that this was no defence to the action, for the three months mentioned in the section refer not to the surveyor's inspection and report, but to the bishop's direction to the surveyor:—*Quære*, whether, even as to the bishop, the section is more than directory. Gleaves *v.* Marriner 107

"DISPUTE"—*Master and Servant—Absence without Leave—Jurisdiction of Justices—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.] By the Employers and Workmen Act, 1875, s. 4, "a dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction." By s. 10 the expression "court of summary jurisdiction" includes justices.—The

"DISPUTE"—*continued.*
plaintiff, a boot manufacturer, summoned the defendant, a workman, before justices for absenting himself from the plaintiff's employment without notice; the justices having dismissed the summons for want of jurisdiction :—*Held*, that absence by a workman from his employer's service constituted a "dispute" between them within the meaning of the foregoing enactment, and that the decision of the justices was erroneous. Clemson *v.* Hubbard - - D. C. A. 179

DISQUALIFICATION—Local board—Party aggrieved - - - - 511
See Party aggrieved.

DISQUALIFICATION OF ALDERMAN—*Alderman or Councillor of a Borough—Interest in a Contract with Council—Disqualification during Continuance of Contract—Penalties for acting—Municipal Corporations Act* (5 & 6 *Wm.* 4, *c.* 76), *ss.* 28, 52, 53.] The disqualification, under s. 28 of 5 & 6 Wm. 4, c. 76, of any person who has any interest in a contract with the council of the borough, to be elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or councillor does not cease to be qualified or become disqualified within the meaning of s. 53, so as to incur penalties for acting after the termination of the contract. Lewis *v.* Carr - C. A. 484

DISQUALIFYING INTEREST—Alderman [C. A. 484
See Disqualification of Alderman.

DOCUMENT—Gift of - - - C. A. 169
See Gift of Policy.

DWELLING-HOUSE—Different tenements
See Inhabited House Duty. 2. [C. A. 469

ECCLESIASTICAL DILAPIDATIONS ACT, 1871, ss. 29, 53 - - - - 107
See Dilapidations.

EJECTMENT—County Court—Value - 416
See County Court Jurisdiction. 2.

—— Mesne profits—Estoppel - - 31
See Estoppel by Judgment. 2.

ELECTED DOMICILE—Foreign company C. A. 17
See Foreign Judgment.

ELEMENTARY EDUCATION ACT, 1870, s. 74
See School Board. [D. C. A. 457

EMPLOYERS AND WORKMEN ACT, 1875, s. 4
See "Dispute." [179

"ENTERTAINMENT" - - C. A. 385
See Refreshment House.

ESTOPPEL—Judgment.
See Cases collected under Estoppel by Judgment.

ESTOPPEL BY JUDGMENT—*Detention of Goods under* 15*l. Value within Metropolitan Police District—Application to Magistrate for Order to deliver up Goods — Refusal of Order — Action of Trover for same Goods*—2 & 3 *Vict. c.* 71, *s.* 40.] A person who has applied to a magistrate within the metropolitan police district for an order under 2 & 3 Vict. c. 71, s. 40, for the delivery up of goods not exceeding 15*l.* in value, which order is, after inquiry, refused, is not precluded, by having

ESTOPPEL BY JUDGMENT—*continued.*
taken these proceedings, from bringing an action of trover for the goods. Dover *v.* Child - 172

2. —— *Ejectment—Action for Mesne Profits—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 180, 207, *sched. A, Nos.* 14, 17.] To trespass for mesne profits the defendants pleaded title to the lands in themselves during the time for which mesne profits were claimed. The plaintiff replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them. On demurrer:—*Held*, that the judgment in ejectment did not operate as an estoppel with respect to the duration of the plaintiff's title, and the replication was therefore bad. Harris *v.* Mulkern - - - - - - 31

EVIDENCE—Justices—Rejection - - 349
See Justices' Jurisdiction.

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *s.* 87—*Execution on Trader's Goods for a Sum exceeding* 50*l. without Sale—Sheriff's Poundage—Officer's Fee—Possession Money.*] A sheriff seized a trader's goods on two successive days under two writs of fi. fa., issued by two judgment creditors, each being indorsed to levy debt, interest, and costs of execution, besides sheriff's poundage, officer's fees, and all other legal incidental expenses. In one case the amount of judgment debt, interest, and costs of writ of execution was under 50*l.*, and was raised by the poundage to more than 50*l.* In the other, the amount of judgment debt, interest, costs of writ of execution, and poundage was under 50*l.*, and was raised by the officer's fee to more than 50*l.* There was no sale, and within fourteen days after the seizures the sheriff received notice of a petition for liquidation, which was filed by the trader after the seizures:—*Held*, following *Ex parte Liverpool Loan Co.* (Law Rep. 7 Ch. Ap. 732), that in each case the goods were "taken in execution in respect of a judgment for a sum exceeding 50*l.*" within s. 87 of the Bankruptcy Act, 1869, and that although there had been no sale the trustee in bankruptcy was entitled to the goods. Howes *v.* Young. Howes *v.* Stone - - - - - - - 146

2. —— *Sheriff—Writ of Fi. Fa.—Possession-money and Fees—Judgment Debt—Levy without Instructions from Execution Creditor.*] When goods have been seized under a writ of fi. fa., and the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realize thereby the amount of his possession-money, fees, and expenses. (So *held* by Grove and Field, JJ., Cleasby, B., dissenting.) —Goods having been seized under a writ of fi. fa., the execution debtor under the Bankruptcy Act, 1869, s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realize the amount of his possession-money, fees, and expenses. The execution

EXECUTION CREDITOR—*continued.*
debtor having sued in a county court the sheriff for an unlawful sale, the judge directed the jury, that, in the absence of evidence to shew that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor:—*Held* (by Grove and Field, JJ., Cleasby, B., dissenting), that the direction by the judge of the county court was correct. Sneary *v.* Abdy - - - - - D. C. A. 299

EXECUTOR—Trespass to goods - - 55
See Trespass.

FELLOW-SERVANT—Negligence - - 251
See Negligence of Servant.

FELONY—Offence less than—Arrest - 352
See Warrant of Arrest.

FOREIGN COMPANY—Foreign judgment C. A. 17
See Foreign Judgment.

—— Income tax - - - - 428
See Income Tax.

FOREIGN CORPORATION—Service of writ 237
See Service out of the Jurisdiction.

FOREIGN JUDGMENT — *Liability of English Shareholder in a Foreign Company — Effect of taking Shares—Agreement to submit to Jurisdiction—Service of Notice at elected Domicile.*] To a declaration claiming a sum recovered by a judgment in a French Court, the defendant pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French Court, or served with any process or summons in the suit, nor did he appear therein; nor had he any notice or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself.—Replication, that the defendant was the holder of shares in a company having its legal domicile in Paris, and thereby became subject to all the liabilities, rights, and privileges attaching or belonging to shareholders, and in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen. That the company became bankrupt, and by the law of France the amount unpaid upon the defendant's shares became payable to the plaintiff as the company's assignee in bankruptcy; that the defendant made default, and provoked a contest; that he never elected a domicile; that the plaintiff thereupon caused a summons to be served at the office aforesaid, which summons required the defendant to appear in the said French Court to answer the plaintiff's claim; that by the law of France that office was the defendant's implied domicile of elec-

FOREIGN JUDGMENT—*continued.*
tion for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon the plaintiff recovered judgment by default against him for the amount unpaid on his shares:—*Held* (affirming the judgment of the Court of Exchequer), that the replication was good, although it did not allege that the defendant ever had any notice or knowledge of the statutes or articles, or of their provisions. COPIN *v.* ADAMSON - **C. A. 17**

FOREIGN PRINCIPAL—Broker—Sold-note
See CONTRACT BY AGENT. **[C. A. 357**

FOREIGN SECURITY—Stamp - - **242**
See STAMP DUTY.

FOREST OF DEAN ACT, s. 39 - - **269**
See STATUTORY DUTY.

FRAUDS, STATUTE OF, s. 6 - **C. A. 110**
See REVOCATION OF WILL.

FRAUDULENT CONVEYANCE—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *subs.* 2.] The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for 245*l.* for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy if the bill were not met. This acceptance not being met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was bonâ fide, but the brandy formed in fact the whole property of the firm:—*Held*, that although the transaction under which the defendant obtained power to sell the brandy might be a "conveyance, gift, delivery, or transfer" within the meaning of the Bankruptcy Act, 1869. s. 6, subs. 2, it was not "fraudulent" within the meaning of the Act, because the defendant's consent to give the bankrupt seven days' time to pay the debts due, taking his acceptance at seven days, was an equivalent for the power of sale given to the defendant. PHILLIPS *v.* HORNSTEDT - **Ex. Ch. 62**

"FRONTING, ADJOINING, OR ABUTTING" **336**
See REPAIR OF ROAD. 2.

FURIOUS DRIVING—*Statute, Construction of—Intention of Legislature—Offence created, Penalty omitted — Jurisdiction of Justices — "Rider"—"Driver"*—5 & 6 *Wm.* 4, *c.* 50, *s.* 78.] By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 78, "If any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger, every person so offending . . . . and being convicted of any such offence . . . . before any two justices of the peace shall . . . . for every such offence forfeit any sum not exceeding 5*l.* in case such driver shall not be the owner of such waggon, cart, or other carriage, and in case the offender be the owner of such

FURIOUS DRIVING—*continued.*
waggon, cart, or other carriage, then any sum not exceeding 10*l.*"—The appellant was convicted by justices of furiously riding on the back of a horse along a highway, and a penalty of 1*l.* was imposed upon him:—*Held*, that although the word "rider" was not mentioned in the penal clause of the section, the justices had jurisdiction to convict the appellant, and that the respondent was entitled to the judgment of this Court. WILLIAMS *v.* EVANS - - - **D. C. A. 277**

GAMING—*Wagering—Cheque given for Share of Winnings*—8 & 9 *Vict. c.* 109, *s.* 18.] To a declaration on a cheque, the defendant pleaded that he had delivered the cheque to the plaintiff in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering, whereby it was agreed that the plaintiff should pay the defendant certain moneys, and that the defendant should employ them and certain moneys of his own in making bets and wagers upon the result of certain horse races, and should pay to the plaintiff a certain proportion of the winnings, and that, except as aforesaid, there was no consideration for the cheque. On demurrer:—*Held*, that the plea was bad, as the plaintiff was not seeking to recover on any contract or agreement by way of gaming or wagering void under 8 & 9 Vict. c. 109, s. 18. BEESTON *v.* BEESTON - - - - **13**

2. —— *Procedure before Justices—Conviction without Information or Summons of Person arrested under Warrant — Gaming-house—Betting-house.*] The respondent laid an information before a justice that a house was "kept or used as a common gaming-house" within the meaning of the "Act to amend the Law Concerning Games and Wagers" (8 & 9 Vict. c. 109), and thereupon the justices granted a warrant under which the appellant was arrested at the house in question. He was brought before two justices, and charged under the "Act for the Suppression of Betting-houses" (16 & 17 Vict. c. 119), s. 3, as "the person," who, "having the management of a room" in the house, used it "for the purpose of betting with persons resorting thereto." No information was laid, nor was any summons issued, under the last-named statute; and the appellant did not waive this omission. The charge having been heard he was convicted, and a penalty was imposed:—*Held* (per Cleasby, B., and Grove, J.; Field, J., dissenting), that the conviction was wrong, and must be quashed. BLAKE *v.* BEECH **[D. C. A. 320**

GIFT OF POLICY—*Document of Title—Handing over Policy of Insurance without Assignment—Right to retain Policy, as against Administratrix of Donor.*] In detinue by an administratrix for a policy of insurance, the evidence was that the intestate had given the policy to the defendant. No assignment was executed, but the defendant retained the policy, and had possession of it at the time of the intestate's death:—*Held*, affirming the judgment of the Exchequer, that the action was not maintainable, for though there had been no assignment of the policy and the right to the money secured by it might not be affected, the right to the document itself passed by the gift to the defendant. RUMMENS *v.* HARE - - - **169**

GUARANTEE OF WHOLE DEBT—*Creditor and Surety—Suretyship for Whole of ascertained Debt with Liability limited to less Sum—Construction of Instrument—Right of Surety to reduce his Liability by rateable Proportion of Dividends paid under Bankruptcy of principal Debtor.*] Where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (primâ facie at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not primâ facie to be construed as a security for part of the debt only. It is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only.—A debtor and his surety executed a joint and several bond for 14,000*l.* conditioned for avoidance if they or either of them should, in satisfaction of a debt of 7000*l.* then due from the debtor to the obligee, pay the 7000*l.*, with a proviso that the surety should not be liable under the bond to a sum or sums exceeding altogether in debt or damages 1300*l.* The debtor having paid 1000*l.*, part of the debt, and then filed a petition for liquidation, the obligee proved for and received a dividend of 9*s.* 2*d.* in the pound on 6000*l.* under the liquidation. After deducting from the 7000*l.* the 1000*l.* and the dividend, there remained more than 1300*l.* due. The obligee having brought an action on the bond against the surety to recover 1300*l.*, the surety contended that he was entitled to deduct from the 1300*l.* a rateable proportion of the dividend, viz. 9*s.* 2*d.* in the pound on 1300*l.*, and was only liable for the balance:—*Held* (affirming the judgment of the Court of Exchequer), that the intention of the bond was that the surety should guarantee the whole 7000*l.*, though his liability was limited to 1300*l.*; that he was, therefore, not entitled to deduct a rateable proportion of the dividend, but was liable for the whole 1300*l.*—*Gray* v. *Seckham* (Law Rep. 7 Ch. 680), and the series of cases there followed, distinguished. Ellis *v.* Emmanuel - - - C. A. 157

HIGHWAY—Furious driving - - 277
See Furious Driving.

—— Repair—Paving—Limitation of time
See Repair of Road. 5. [C. A. 514

—— Repair—Premises adjoining - - 336
See Repair of Road. 2.

—— Repair—Sewer - - - - 400
See Repair of Road. 4.

HIGHWAY ACT, 1835, s. 78 - - 277
See Furious Driving.

ILLEGAL CONSIDERATION—*Contract—Promise not to expose Misconduct of Plaintiff—Public Policy.*] To an action on a bond against the defendant as executor, he pleaded that the plaintiff had seduced and committed adultery with the wife of the defendant's testator, between whom and the plaintiff it was agreed, that in consideration that the defendant's testator would not

ILLEGAL CONSIDERATION—*continued.*
expose and make public the conduct of the plaintiff, he would not sue on the bond. On demurrer to the plea:—*Held*, that there was no valid consideration for the agreement, and that the plea was bad. Brown *v.* Brine - 5

ILLEGALITY—Contract - - - - 5
See Illegal Consideration.

INCOME TAX—*Joint Stock Company residing in the United Kingdom—Company incorporated and registered in England and earning Profits abroad*—5 & 6 *Vict. c.* 35, *s.* 40—16 & 17 *Vict. c.* 34, *s.* 2, *sched. D.*] The Cesena Company was incorporated under the Companies Acts, 1862 and 1867, and was afterwards registered for all purposes in Italy. It was founded with the object of carrying on the business of sulphur miners, manufacturers, and merchants in Italy, and, for that purpose, of purchasing certain sulphur mines and plant there. So far as its affairs in the United Kingdom were concerned, the company was managed by a board of directors, who held their meetings at the company's registered office in England. By the articles of association, the working and disposal of the mines and the general business of the company were wholly under the management of the board, subject in certain respects to the control of general meetings of the shareholders, which were to be held in London. There was an Italian delegation, consisting of two or three members of the board resident in Italy, by whom all the practical management of the company's property and affairs in Italy was carried on. All the operations connected with the manufacture and sale of sulphur were exclusively carried on in Italy, where the company's profits (if any) were earned; and the dividends required for the English shareholders were the only part of its profits sent to the United Kingdom. Of the shares, about one-third were held in England, and the rest in foreign countries.—The Calcutta Company was also incorporated under the Companies Acts of 1862 and 1867, but was not registered elsewhere than in England. It was founded with the object of buying jute mills in Bengal, carrying on the business of manufacturers and dealers in jute and other similar materials, and establishing agencies for the purposes of the company throughout the world. The memorandum of association provided that the company's registered office should be situate in England, In fact, the company had no office or other place of business in the United Kingdom, though for registration it had an address in London at the office of one of the directors, and when meetings of the English members of the company were held there it was by his favour. So far as its affairs in the United Kingdom were concerned, the company was managed by a board of directors, who had, under the articles of association, general powers similar to those conferred upon the board of the Cesena Company. The board had power to and did appoint agents and a director who resided in Calcutta and had the entire control of the business in India. The buying of the raw material, the manufacture and sale thereof, and all the operations connected with the company's business, were exclusively carried on in India, where alone the profits (if any) were earned. The company had no property in the

INCOME TAX—*continued.*

United Kingdom, and nothing came into the hands of the English directors except what was sent from India to pay necessary expenses in England, and except such proportion of the profits as was divisible among the shareholders in the United Kingdom. After receiving such proportion the directors called a meeting of the shareholders and declared the amount to be distributed as dividend for the current year. Of the shares, about one-third were held by shareholders in the United Kingdom.—Both companies contended that they were liable to income tax only upon the proportion of profits actually received in the United Kingdom:—*Held*, that both companies were "residing in the United Kingdom" within 16 & 17 Vict. c. 34, s. 2, sched. D., and were liable to pay income tax upon the whole of their profits wherever earned. THE CESENA SULPHUR COMPANY *v.* NICHOLSON. THE CALCUTTA JUTE MILLS COMPANY *v.* NICHOLSON - - - - 428

2. —— 5 & 6 *Vict. c.* 35, *s.* 100, *Case I., Rule* 3 —*Deductions for Depreciation of Buildings, Plant, and Machinery—Additions to Capital.*] A company carrying on business as ironfounders set apart, in accordance with their articles of association, a sum of money from their net profits for depreciation of buildings, fixed plant, and machinery, and claimed, in making a return under Sched. D. of their annual profits or gains, to deduct this amount:—*Held*, that such a deduction was contrary to 5 & 6 Vict. c. 35, s. 100, Case I., Rule 3, as the amount set aside was in effect an addition to capital. FORDER *v.* HANDYSIDE 233

INFORMATION—Gaming—Procedure - 320
See GAMING.

INHABITED HOUSE DUTY—*Exemption of Hospital or House for Reception or Relief of Poor Persons*—14 & 15 *Vict. c.* 36, *s.* 2—48 *Geo.* 3, *c.* 55, *Sch. B.; Exemptions, Case* 4—*Lunatic Asylum—Detached House for Medical Superintendent resident in the Asylum*—16 & 17 *Vict. c.* 97, *ss.* 1, 2, 55, 132.] The medical superintendent of a lunatic asylum was appointed under 16 & 17 Vict. c. 97, s. 55, which enacted that he should be "resident in such asylum." He lived in a detached house, separated from the main buildings of the asylum by walls, but within the boundary of the asylum, and having ready access to the main buildings through gates in the walls. The house was specially built and occupied as the residence of the medical superintendent, was suitable for the purpose, and did not contain more accommodation than was reasonably necessary for himself and family.—Case 4 of the exemptions in 48 Geo. 3, c. 55, Sch. B., exempts from inhabited house duties "any hospital, charity school, or house provided for the reception or relief of poor persons." The main buildings of the asylum were admitted to be within the exemption:—*Held*, that the medical superintendent's house was a part of the asylum, and therefore within the exemption. JEPSON *v.* GRIBBLE - - - - 151

2. —— *Inland Revenue—Dwelling House let in different Tenements*—48 *Geo.* 3, *c.* 55, *sch. B., rules* 6, 14—*Valuation List—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 45, 76.] The Westminster Chambers in the metropolis belong to an association, and consist of seven blocks of

INHABITED HOUSE DUTY—*continued.*

building. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance, and each block is in its internal arrangement structurally divided into different tenements or suites of rooms. These suites, like chambers in the Inns of Court, are quite distinct from and have no means of communication with each other, except that each has an open door opening on to the common staircase. The street door is locked at night, and a porter, appointed and removeable by the association, resides in a distinct suite of rooms in the basement of the block, and has a key of and access to each of the suites of rooms for general superintendence, and as the tenant's servant. The Westminster Improvement Act, 1853, enacts that, where any "house" erected on the land in question is to be occupied by different persons in distinct sets of apartments, the association may demise or sell any set separately from the rest of the "house." None of the 117 suites (of which the seven blocks consist) have been sold and some have never been let, but most are let as chambers, offices, or residences, to tenants for a term, at yearly rents, payable quarterly, under written agreements, with provisoes for re-entry in case of non-payment of rent or breach of covenant. The association provide gas for the staircases, halls, and passages, and water for the entire building, and pay rates and taxes, charging the tenants higher rents in consequence. In the valuation list, prepared under the Valuation (Metropolis) Act, 1869, each suite of rooms is treated as a separate hereditament, the respective tenants thereof being separately assessed to the poor-rate as the occupiers; and the Court of Queen's Bench, in *Reg.* v. *St. George's Union* (Law Rep. 7 Q. B. 90), decided that for the poor-rate the suites were rightly treated as separate hereditaments:—*Held*, affirming the judgment of the Court below, first, that for the purpose of the inhabited house duty, rule 6 of 48 Geo. 3, c. 55, sch. B., applied, and the association must be assessed as occupiers of each block treated as one dwelling-house; and that the respective tenants of the different suites ought not to be assessed as occupiers of distinct properties under rule 14.—Secondly, that the value of each block was properly represented by the aggregate sum of the values appearing in the valuation list, although, owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the association. THE ATTORNEY-GENERAL *v.* THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION, LIMITED C. A. 469

INSURANCE, MARINE—Re-insurance C. A. 36
See RE-INSURANCE.

—— Termination of risk - - 81, C. A. 141
See TERMINATION OF RISK.

INTEREST—Disqualification of alderman C.A. 484
See DISQUALIFICATION OF ALDERMAN.

INTERPLEADER—*Summary Decision by a Judge at Chambers—Right of Appeal—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *ss.* 14, 17 —*Judicature Act*, 1873, *ss.* 19, 50—*Sch. Order I., Rule* 2.] When a judge at chambers disposes of the merits of an interpleader in a summary man-

INTERPLEADER—*continued.*
ner under the Common Law Procedure Act, 1860, s. 14, his decision is, by s. 17, final, and he cannot, even with consent of parties, give a right of appeal to the Court; and no alteration in this respect is made by ss. 19 and 50 of the Judicature Act, 1873, taken together with Order I., Rule 2. DODDS *v.* SHEPHERD - - - - 75

JOINT STOCK COMPANY—Articles of association - - - - 20, C. A. 88
See ARTICLES OF ASSOCIATION.
—— Residence—Income tax - - 428
See INCOME TAX. 1.
JUDGE AT CHAMBERS—Transfer of action 102
See TRANSFER OF ACTION.
JUDGMENT—Estoppel—Detention of goods 172
See ESTOPPEL BY JUDGMENT. 1.
—— Mesne profits—Estoppel - - 31
See ESTOPPEL BY JUDGMENT. 2.
JUDICATURE ACT, 1873, ss. 18, 45 - 408
See APPEAL FROM MAYOR'S COURT.
—— **ss. 19, 50** - - - - - 75
See INTERPLEADER.
—— **s. 25, subs. 8** - - - C. A. 309
See RECEIVER.
—— **ss. 31, 34, 36, 39** - - - 132
See TRANSFER OF ACTION.
JUDICATURE ACT, 1875, s. 11, subs. 2 - 132
See TRANSFER OF ACTION.
—— **Sch. O, LV., O. LIII. r. 4, O. LXI. r. 1.** 53
See NOTICE OF MOTION.
—— **Sch. O. I. r. 2** - - - - 75
See INTERPLEADER.
JURISDICTION—Foreign court—Elected domicile
See FOREIGN JUDGMENT. [C. A. 17
—— Justices—Limitation of time - - 188
See JUSTICES' JURISDICTION. 1.
—— Justices—Rejection of evidence - 349
See JUSTICES' JURISDICTION. 2.
—— Revising Barrister - - - 376
See REVISING BARRISTER.
JUSTICES—Information—Procedure - 320
See GAMING.
—— Jurisdiction - - - - 179
See "DISPUTE."
—— Jurisdiction—Limitation of time - 188
See JUSTICES' JURISDICTION. 1.
—— Jurisdiction—Rejection of evidence 349
See JUSTICES' JURISDICTION. 2.

JUSTICES' JURISDICTION—11 & 12 *Vict. c.* 43, *ss.* 1. 11—*Jurisdiction of Justices—Limitation of Time—Rule as to Words ejusdem generis—Complaint—"Order for the Payment of Money or otherwise."*] The words, "order for the payment of money or otherwise," in 11 & 12 Vict. c. 43, s. 1, include orders of every kind which a justice of the peace has authority to make; and, therefore, where a local Act for the improvement of a borough provided that if buildings should be erected "contrary to any requirement by the corporation," the corporation might "make complaint thereof before a justice," who was empowered to make an order directing the demolition of the building:—*Held*, that, pursuant to 11 & 12 Vict. c. 43, s. 11, the complaint upon which an order for demolition was to be founded must be made within six months after the completion of a building erected contrary to the provisions of the local Act. MORANT *v.* TAYLOR - - - D. C. A. 188

2. —— *Procedure before Justices—Power to reject irrelevant Evidence—"Obstruction in any Thoroughfare"—Metropolitan Police Act* (2 & 3 *Vict. c.* 47), *s.* 60, *subs.* 7.] A penalty is imposed by 2 & 3 Vict. c. 47, s. 60, subs. 7, upon every person "who shall set up or continue any . . . . projection from any . . . . part of any . . . . shop . . . . so as to cause any . . . . obstruction in any thoroughfare."—The appellant was summoned before a metropolitan police magistrate for an offence against the foregoing enactment. It was proved that he used affixed to the front of his shop a moveable show-board, 11½ inches of which projected at a height of 2 feet 3 inches over the footway of the street, which was 36 feet 8 inches wide. The appellant proposed to call witnesses to prove that they were not incommoded by the projection; but the magistrate refused to hear them, and convicted the appellant:—*Held*, that the magistrate had power to reject the evidence proposed to be adduced as irrelevant, and that the conviction must be affirmed. READ *v.* PERRETT [D. C. A. 349

LANDLORD AND TENANT—Compensation—Game - - - C. A. 257
See ARBITRATION CLAUSE.
—— Covenant not to affect licence - C. A. 265
See COVENANT NOT TO AFFECT LICENCE.
LEAD MINE—Assessment to poor-rate - 310
See ASSESSMENT TO POOR-RATE.
LEAVE TO DEFEND—Writ specially indorsed
See WRIT SPECIALLY INDORSED. [262
LICENCE—Covenant not to affect C. A. 265
See COVENANT NOT TO AFFECT LICENCE.
—— Occasional - - - - 100
See PUBLIC-HOUSE.
—— Refreshment-house - - C. A. 385
See REFRESHMENT HOUSE.
LIFE ASSURANCE—Gift of policy - C. A. 169
See GIFT OF POLICY.
LIMITATION—Recovery of paving expenses
See REPAIR OF ROAD. 5. [C. A. 514

LIMITATIONS, STATUTE OF—*Acknowledgment—Request for an Account.*] In an action for work done, the plaintiff, in answer to a plea of the Statute of Limitations, put in evidence the two following letters, written within six years of the commencement of the action by the defendants' testator, the person for whom the work was done, to the plaintiff:—"I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week":—*Held*, that they amounted to a promise to pay the balance due on the account, and took the case out of the statute. QUINCEY *v.* SHARPE - 72

LOCAL BOARD — Disqualification — Party aggrieved - - - - 511
See Party aggrieved.

LOCAL GOVERNMENT AMENDMENT ACT, 1861, s. 24 - - - - C. A. 514
See Repair of Road. 5.

LUNATIC ASYLUM—Inhabited house duty 151
See Inhabited House Duty.

MARINE INSURANCE—Re-insurance C. A. 36
See Re-insurance.

—— Termination of risk - 81, C. A. 141
See Termination of Risk.

MARKET—Statute—"Town" - - 464
See "Town."

MASTER AND SERVANT—"Dispute"—38 & 39 Vict. c. 90, s. 4 - - - 179
See "Dispute."

—— Negligence—Fellow-servant - - 251
See Negligence of Servant.

MAYOR'S COURT—Appeal—Practice - 408
See Appeal from Mayor's Court.

MEASURE OF DAMAGE—Detention of ship 60
See Demurrage.

MEDICAL SUPERINTENDENT—Lunatic asylum
See Inhabited House Duty. [151

MESNE PROFITS—Ejectment—Estoppel - 31
See Estoppel by Judgment. 2.

METROPOLIS MANAGEMENT ACT, 1855, ss. 96, 98, 105 - - - - 223
See Repair of Road. 1.

METROPOLIS MANAGEMENT ACT, 1862, ss. 44, 52, 112 - - - - 400
See Repair of Road. 4.

—— **ss. 52, 53, 112** - - - - 395
See Repair of Road. 3.

METROPOLIS MANAGEMENT AMENDMENT ACT, 1862, s. 77 - - - 223
See Repair of Road. 1.

METROPOLITAN POLICE ACT, s. 60, subs. 7 349
See Justices' Jurisdiction. 2.

MINE—Assessment to poor-rate - - 310
See Assessment to Poor-rate.

MINERALS—Damage to surface—Compensation
See Support. [C. A. 496

MOTION—Notice of—Costs - - - 53
See Notice of Motion.

MUNICIPAL CORPORATIONS ACT, ss. 28, 52, 53 [C. A. 484
See Disqualification of Alderman.

NEGLIGENCE—Servant—Fellow-servant 251
See Negligence of Servant.

NEGLIGENCE OF SERVANT — *Foreman and Fellow-servant.*] The defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendants, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to shew how this happened, nor any evidence that the manager and other persons employed by the defendants were incompetent:—*Held*, that the defendants were not liable, as the plaintiff had not shewn that the persons employed by the defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow-workman of the plaintiff. Allen *v.* The New Gas Company - - - 251

NEGLIGENCE OF SERVANT—*continued.*

NEW STREET—Repairs - - - 223
See Repair of Road. 1.

—— Sewer - - - - 395, 400
See Repair of Road. 3, 4.

NOTICE OF MOTION—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *Sch. Order LV.—Order LIII., Rule* 4—*Order LXI., Rule* 1—*Costs—Notice of Motion invalid—Failure to appear in Court after giving Notice of Motion.*] On the 20th of December, 1875, the plaintiffs served on the defendants a notice that the Court would be moved on the 22nd, or as soon after as counsel could be heard, to reinstate for argument a demurrer in which judgment had been given for the defendants in the absence of the plaintiffs. On the 11th and 12th of January, 1876, the defendants appeared in Court by their counsel to oppose the motion, but no one appeared for the plaintiffs:—*Held*, that the notice was bad on two grounds: 1, because, under the Judicature Act, 1875, Sch. Order LXI., Rule 1, the Michaelmas sittings terminate on the 21st of December; and, 2, because there were not two clear days between the 20th and 22nd, as required by Order LIII., Rule 4; that the defendants therefore were not bound to appear, and were not entitled to their costs of doing so. Daubney *v.* Shuttleworth 53

NUISANCE—Abatement—Validity of order [C. A. 344
See Abatement of Nuisance.

—— Smoke—Penalty - - 67, 102
See Smoke. 1, 2.

—— Sewer—Poisonous gas - - - 196
See Nuisance in Sewer.

—— Watercourse—River - - - 419
See Watercourse.

NUISANCE IN SEWER—*Nuisances Removal Act for England* (18 & 19 *Vict. c.* 121) *ss.* 8, 12—*"Nuisance"—"Drain"—Public Sewer—Complaint by joint Wrong-doer.*] By 18 & 19 Vict. c. 121, s. 8, "the word 'nuisances' under this Act shall include any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, so foul as to be a nuisance or injurious to health."—By s. 12, when a nuisance had been ascertained to exist, the local authority could summon before justices "the person by whose act, default, permission, or sufferance, the nuisance arises or continues," and if it was proved to the satisfaction of the justices that the nuisance existed, they should make an order in writing for the abatement or discontinuance of such nuisance.—By a local Act the respondents were bound to flush, cleanse, and trap the sewers in the town of H.—The appellants were possessed of chemical works at H., and were entitled to discharge refuse by two separate drains into a

NUISANCE IN SEWER—*continued.*
public sewer. By the one drain liquid impregnated with muriatic acid was discharged, and by the other liquid impregnated with sulphur. Upon their combination in the sewer sulphuretted hydrogen gas was produced, which escaped in sufficient quantities to be injurious to the public health. No nuisance existed in the appellants' drains. The respondents had not properly flushed, cleansed, and trapped the sewer.—Complaint having been made by the respondents of the escape of the sulphuretted hydrogen gas, an order for the abatement thereof was made by justices upon the appellants:—*Held*, that the escape of sulphuretted hydrogen gas from the sewer was a nuisance within the meaning of 18 & 19 Vict. c. 121, s. 8, that it arose from the act of the appellants, and that the respondents could lawfully make complaint thereof, although they themselves might have contributed to the existence of the nuisance. St. Helens Chemical Company *v.* The Corporation of St. Helens - - - **D. C. A. 196**

NUISANCES REMOVAL ACT, ss. 8, 12 - **196**
See Nuisance in Sewer.

NUISANCES REMOVAL ACT, 1855 - - **67**
See Smoke. 1.

OCCASIONAL LICENCE—Consent of justice **100**
See Public-house.

OFFENCE LESS THAN FELONY—Arrest - **352**
See Warrant of Arrest.

"ORDER FOR THE PAYMENT OF MONEY OR OTHERWISE" - - - **188**
See Justices' Jurisdiction. 1.

PARTNER—Service of writ - - - **50**
See Writ under Bills of Exchange Act.

PARTY AGGRIEVED—*Local Board—Acting as Member after Disqualification—"Party aggrieved"—Consent of Attorney General to Action for Penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *and Sch.* 2, *Rule* 70.] By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that Act shall not be "taken by any person other than by a party aggrieved," or by a local authority, without the consent of the Attorney General; and by sch. 2, r. 70, a penalty of 50*l.* is imposed upon any person acting as member of a local board without qualification. The defendant, who was acting as chairman of a local board after disqualification, made a complaint to the members thereof as to certain conduct of the plaintiff, who was clerk to the board; the plaintiff, fearing that he might be dismissed from his office, resigned it, and sued the defendant to recover a penalty of 50*l.* for acting without qualification:—*Held*, that the plaintiff was not "a party aggrieved," within the meaning of the Public Health Act, 1875, s. 253, and that he could not sue for the penalty without the consent of the Attorney General. Rochfort *v.* Atherley **[511**

PASSENGERS' LUGGAGE—*Railway Company—Carriers by Steamer—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 16.] Sect. 7 of the Railway and Canal Traffic Act, 1854, which regulates the liabilities of railway companies as to "any articles, goods, or things in the receiving, forwarding, or delivering thereof," applies to passengers' luggage; so that a condition made by a railway company limiting their liability in respect of passengers' luggage is not binding unless such condition is reasonable, and is contained in a contract signed by the passenger. That section is incorporated by s. 16 of the Regulation of Railways Act, 1868, so as to extend its provisions to traffic carried on by steam vessels owned or used by railway companies. Cohen *v.* The South Eastern Railway Company - **217**

PAVING—Recovery of expenses—Time **C. A. 514**
See Repair of Road. 5.

PLEADING—Jurisdiction - - - **361**
See Service out of the Jurisdiction.

POLICY—Gift of - - - **C. A. 169**
See Gift of Policy.

POLLUTION OF WATER—"Wilfully" - **419**
See Watercourse.

POOR-RATE—Assessment—Lead mine - **310**
See Assessment to Poor-rate.

POSSESSION—Bill of sale—Servant - **364**
See Affidavit with Bill of Sale.

POSSESSION UNDER BILL OF SALE—*Bill of Sale—Possession of Goods by Grantor—Demand of Possession by Grantee—Bailor of Goods in Possession within Bills of Sale Act* (17 & 18 *Vict. c.* 36).] Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, and accordingly demanded them from the owner of a house in which the grantor had placed them, and threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation:—*Held*, reversing the judgment of the Court of Exchequer, that the fact that the grantee was entitled to and demanded possession did not take the goods out of the grantor's possession within the meaning of 17 & 18 Vict. c. 36, and that the trustee in liquidation was entitled to the goods as against the grantee.—*Held*, also (though not necessary for the decision), that if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the Act, and would not have been taken out of the grantor's possession by the fact that the grantee was entitled to and demanded possession. Ancona *v.* Rogers - - - - **C. A. 285**

PRACTICE—Interpleader—Appeal - **75**
See Interpleader.

—— Notice of motion - - - **53**
See Notice of Motion.

—— Receiver—Court of Appeal - **C. A. 309**
See Receiver.

—— Service of writ - - - - **50**
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—— Service out of the jurisdiction—Pleading [361
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—— Transfer of action - - - 102
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—— Writ—Service abroad - - - - 237
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—— Writ specially indorsed - - 262
See WRIT SPECIALLY INDORSED.
"PREMISES FRONTING, ADJOINING, OR ABUTTING" - - - - 336
See REPAIR OF ROAD. 2.
PRINCIPAL AND AGENT—Broker—Sold-note
See CONTRACT BY AGENT - **C. A. 357**
PRINCIPAL AND SURETY—Guarantee of whole debt - - - - **C. A. 167**
See GUARANTEE OF WHOLE DEBT.
PROHIBITION—County Court—Res judicata 416
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PUBLIC HEALTH ACT, 1848, s. 69 - 336
See REPAIR OF ROAD. 2.
—— —— **ss. 69, 129** - - **C. A. 514**
See REPAIR OF ROAD. 5.
—— **1875, ss. 91, 94, 95** - - **C. A. 344**
See ABATEMENT OF NUISANCE.
—— —— **s. 253. & Sch. 2, r. 70** - - 511
See PARTY AGGRIEVED.
—— —— **s. 343** - - - - 102
See SMOKE. 2.
PUBLIC-HOUSE—*Occasional Licence for Sale of Intoxicating Liquors—Consent of Justice—Irregularity in obtaining Licence*—25 & 26 *Vict. c.* 22, *s.* 13—26 & 27 *Vict. c.* 33, *s.* 20, *subs.* 1.] By 25 & 26 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, subs. 1, an occasional licence for the sale of intoxicating liquors is to be granted by an officer of excise upon the written consent of a justice "usually acting at the petty sessions for the petty sessional division within which the place of sale is situate."—The appellant obtained from a duly authorized officer of excise an occasional licence for the sale of intoxicating liquors; the justice who signed the written consent did not usually act for the petty sessional division within which the place of sale was situate. The appellant having sold intoxicating liquors at the time and place mentioned in the occasional licence, was convicted by justices of selling intoxicating liquors without a licence. It was not proved that the appellant had acted otherwise than bonâ fide:—*Held*, that although an irregularity had been committed in obtaining the licence, yet it protected the appellant from penal consequences, and that the conviction was wrong. STEVENS *v.* EMSON - - - - - **D. C. A. 100**
—— Covenant not to affect licence - **C. A. 265**
See COVENANT NOT TO AFFECT LICENCE.

RATING ACT, 1874, ss. 7, 8, 13 - - 310
See ASSESSMENT TO POOR-RATE.
RAILWAY AND CANAL TRAFFIC ACT, 1864, s. 7 - - - - - 217
See PASSENGERS' LUGGAGE.
RAILWAY COMPANY—Passenger's luggage 217
See PASSENGERS' LUGGAGE.
RECEIVER—*Practice—Interim Preservation of Property—Receiver and Manager—Appointment by Court of Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *subs.* 8—*Rules of Supreme Court, Order LII., Rules* 1, 3, 4.] In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the Court of Appeal (no previous application having been made to the Divisional Court or a judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the Court might make in the matter. HYDE *v.* WARDEN [**C. A. 309**
RECREATION—Custom to dance - - 1
See CUSTOM TO DANCE.
"REFRESHMENT, RESORT, AND ENTERTAINMENT" - - - **C. A. 385**
See REFRESHMENT HOUSE.
REFRESHMENT HOUSE—*Licence*—23 *Vict. c.* 97, *s.* 6—"*Entertainment.*"] By s. 6 of 23 Vict. c. 97, "all houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment" during certain hours of the night are to be deemed refreshment houses, and require a licence. By s. 9 a penalty is imposed upon keeping unlicensed refreshment houses. During the prohibited hours the appellant kept open without a licence a shop for the sale of ginger-beer and lemonade; it consisted of one room only, open in front, without seats. The appellant was convicted of keeping an unlicensed refreshment house:—*Held* (by James and Mellish, L.JJ., and Quain, J., affirming the judgment of the Court of Appeal from Inferior Courts, Baggallay, J.A., dissenting), that the appellant's shop was kept open for public refreshment, resort, and entertainment within the meaning of the foregoing enactment, and that the conviction was right. HOWES *v.* THE BOARD OF INLAND REVENUE [**C. A. 385**
REGISTRATION COURT—Power of revising barrister - - - - 376
See REVISING BARRISTER.
REGULATION OF RAILWAYS ACT, 1868, s. 16
See PASSENGERS' LUGGAGE. [217
RE-INSURANCE—*Marine Insurance—Policy—Interest.*] An underwriter who has subscribed an insurance "on goods" may re-insure by the same description, and the policy need not be expressed to be a re-insurance. MACKENZIE *v.* WHITWORTH - - - - **C. A. 36**
REMOTENESS OF DAMAGE—Detention of ship
See DEMURRAGE. [60
REPAIR OF ROAD—"*New Street*"—*Cost of Paving—Liability of Owners of Adjoining Houses and Land—Discretion of Vestry and District Board—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 96, 98, 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.] When within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the cost thereof upon the general rate under ss. 96, 98 of that Act; they are bound to charge the expense of laying the pavement

REPAIR OF ROAD—*continued.*
upon the owners of the adjoining houses and land, under s. 105 of that statute, as varied by 25 & 26 Vict. c. 102, s. 77.—In 1855 a road in P., within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, ran between an irregular line of houses and market gardens upon the south side, and market gardens upon the north. Between that year and 1874, a continuous line of houses was built along the north side, and several houses along the south. The district board, within whose jurisdiction the road lay, in 1874, paved a footpath by the side of the road, and paid for the cost of the work under 18 & 19 Vict. c. 120, ss. 96, 98, out of the general rate levied upon the inhabitants of P.:—*Held*, first, upon the authority of *Pound* v. *Plumstead Board of Works* (Law Rep. 7 Q. B. 183), that between 1855 and 1874 the road had become a "new street" within 18 & 19 Vict. c. 120, s. 105; secondly, that the district board had no power to charge the cost of paving the footpath upon the general rate, but that it was compulsory upon them to obtain payment thereof from the owners of the adjoining houses and land, under that section, as varied by 25 & 26 Vict. c. 102, s. 77. DRYDEN *v.* THE OVERSEERS OF PUTNEY - - - - D. C. A. 223

2. —— *Street*—"*Premises fronting, adjoining or abutting*"—*Public Health Act*, 1848 (11 *&* 12 *Vict. c.* 63), *s.* 69.] By the Public Health Act, 1848, s. 69, "in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice."—The respondents' premises were divided from D. street by a small stream, but by two bridges over the stream their premises were connected with it; by means of gates they could effectually close all communication. One of the bridges had been moved and reinstated by the respondents. The principal outlet from their premises led into W. Street:—*Held* (per Grove and Field, JJ.) that the respondents' premises fronted and abutted upon D. Street within the meaning of the foregoing enactment.—Per Cleasby, B., hesitating, that the premises adjoined D. Street. THE WAKEFIELD LOCAL BOARD OF HEALTH *v.* LEE [D. C. A. 336

3. —— *Sewer — Street — New Street — Apportionment — Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 52, 53, 112.] 25 & 26 Vict. c. 102, s. 52, enacts: "Where any sewer shall . . . . be constructed by any . . . . district board in or for the drainage of any new street . . . . the expense . . . . shall be . . . . defrayed by the owners of such street . . . . and of the land bounding or abutting" thereon. Sect. 53 enacts: "Where any sewer shall be constructed by any . . . . district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense . . . . shall be . . . . defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively . . . . and the residue of such expenses shall be defrayed by the . . . . district board out of sewers rates levied in their . . . . district." By s. 112 "new street" includes streets to be formed after the 7th of August, 1862. The appellant was the owner of a piece of land within the respondents' district, upon which streets had been laid out since the 7th of August, 1862; certain building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The respondents laid down sewers in the streets and apportioned the whole of the cost between the appellant, his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon the appellant's land, although no sewer had previously existed in the streets thereon:—*Held*, that the word "street" in s. 53 included "new streets" as defined by s. 112, as well as old streets, that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by the respondents out of the sewers rate levied in their district:—*Semble*, that even if s. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets. SHEFFIELD *v.* THE BOARD OF WORKS FOR THE FULHAM DISTRICT - - D. C. A. 395

4. —— *Sewer—New Street—Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 44, 52, 112.] The respondent, within the limits of the Metropolis Management Acts, and with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of the M. road, in which he owned certain houses, and which was a "new street" within the meaning of the above-mentioned Acts. Afterwards the appellants took up the sewer constructed by the respondent, and in place thereof laid down another for the drainage of the neighbourhood:—*Held*, that the respondent was not liable to pay any portion of the cost of the sewer laid down by the appellants. THE BOARD OF WORKS FOR THE FULHAM DISTRICT *v.* GOODWIN - D. C. A. 400

5. —— *Public Health Act*, 1848 (11 *&* 12 *Vict c.* 63), *ss.* 69, 129—*Local Government Act* (1858) *Amendment Act*, 1861 (24 *&* 25 *Vict. c.* 61), *s.* 24—11 *&* 12 *Vict. c.* 43, *s.* 11—*Expense of sewering and paving Street—Limitation as to Proceedings in County Court.*] By the Public Health Act, 1848, s. 69, the local board might require the owners of premises fronting or abutting upon any street to sewer and pave the same, and upon default might themselves execute the work; and the expenses incurred by them were to be paid by the owners in default, and might be recovered in a summary manner. By s. 129 summary proceedings were to be taken before two justices. By the Local Government Act (1858) Amendment Act, 1861, s. 24, proceedings for the recovery of demands below 20*l.*, which local boards

REPAIR OF ROAD—*continued.*
were empowered to recover in a summary manner, might at the option of the local board be taken in the county court. By 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making a complaint before justices, it must be made within six months from the time when the matter thereof arose.—The plaintiffs, under the Public Health Act, 1848, s. 69, incurred expenses in sewering and paving a street, upon which premises belonging to R. abutted; his proportion of the expenses amounted to 13*l.* 5*s.* 5*d.* On the 18th of February, 1873, notice was served by the plaintiffs on R. that the foregoing amount was apportioned upon him, and that the same would become payable by him, unless within three months he disputed it. R. did not dispute the apportionment. The money not having been paid, on the 8th of June, 1875, a plaint was issued by the plaintiffs in a county court to recover it from the defendant, as R.'s executor:—*Held*, that the limitation of time mentioned in s. 11 of 11 & 12 Vict. c. 43, applied as well to proceedings in county courts as to proceedings before justices, and that the action could not be sustained, it having been brought more than six months after the expiration of the three months allowed for disputing the amount apportioned upon R. The Tottenham Local Board of Health *v.* Rowell C. A. 514

REPEAL OF STATUTE—*Statutes, Construction of—Repeal by Implication—Later Statute inconsistent with earlier.*] By 3 & 4 Vict. c. 85, s. 6, "all withs and partitions between any chimney or flue . . . . shall be of brick or stone, and at least equal to half a brick in thickness, upon pain of forfeiting a sum of money. A subsequent local statute enacted that in the borough of H. "the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall from time to time be determined or approved by the corporation," and then, if no direction should be given by the corporation as to constructing chimneys, prescribed certain directions different from those contained in 3 & 4 Vict. c. 85, s. 6. The appellant, within the borough of H., built a chimney, which was not in accordance with the provisions of 3 & 4 Vict. c. 85, s. 6, and he was convicted before justices of an offence against that Act:—*Held*, that the subsequent local statute had not repealed 3 & 4 Vict. c. 85, s. 6, within the borough of H., and that the conviction was right. Hill *v.* Hall [D. C. A. 411

REPEALED STATUTE—Penalty - - 102
See Smoke. 2.

REVENUE—Income tax - - - 233
See Income Tax.

—— Inhabited house duty - - - 151
See Inhabited House Duty.

—— Stamp duty - - - - 242
See Stamp Duty.

REVISING BARRISTER—*Jurisdiction—Power to order Person to quit the Court—Interruption of Business of the Court—The County Voters' Registration Act*, 1865 (28 *Vict. c.* 36), *s.* 16.] By 28 Vict. c. 36, s. 16, "It shall be lawful for any revising barrister . . . . to order any person to be removed from his Court who shall interrupt the business of the Court, or refuse to obey his lawful orders in respect of the same." The defendant, a revising barrister, ordered the plaintiff to be removed from his Court, which he was then holding for the revision of the lists of voters for the county of D.; the ground of the order was that, in the previous year, whilst the defendant was sitting as revising barrister, the plaintiff had wrongfully withheld certain documents, and had thereby caused W., a claimant to be registered as voter, to be deprived of his vote. The plaintiff having sued in a county court for wrongful expulsion from the defendant's court, the latter, by way of special defence, relied upon the provisions of 28 Vict. c. 36, s. 16, and the judge nonsuited the plaintiff on the ground that the question of "interruption" having been decided by a revising barrister, his discretion could not be reviewed before another tribunal:—*Held*, upon appeal to this Court, that the special defence was not proved and that the nonsuit was wrong. Willis *v.* Maclachlan - - - D. C. A. 376

REVOCATION OF WILL—*Will made before* 1838 *—Obliteration of Devise or Clause—Revocation—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 6.] A testator, who died before 1838, by a will duly executed and attested devised realty to his mother, "Elizabeth Eley her heirs and assigns for ever." After execution he drew his pen through the words "Eley her heirs and assigns for ever" and wrote the word "Eley" above the erased words. On the question whether the obliteration cut down the devise from an estate in fee to an estate for life, as being a revocation of a devise or of a clause within s. 6 of the Statute of Frauds:—*Held* (reversing the judgment of the Exchequer Division), that there was a revocation of a clause within the statute; and that the mother took an estate for life only. Swinton *v.* Bailey C. A. 110

ROYALTY—Mine—Poor-rate - - - 310
See Assessment to Poor-rate.

RULES OF SUPREME COURT, O. I., r. 2 - 75
See Interpleader.

—— **O. II., r. 4; O. XI., rr. 1, 3** - - 237
See Service out of the Jurisdiction.

—— **O. II., rr. 4, 5; O. XI., rr. 1, 3** - 361
See Service out of the Jurisdiction.

—— **O. II., r. 6.; O. IX., rr. 2, 6** - - 50
See Writ under Bills of Exchange Act.

—— **O. III., r. 6; O. XIV., rr. 1, 6** - - 362
See Writ specially indorsed.

—— **O. LI., r. 2; O. LIV., r. 2** - - 102
See Transfer of Action.

—— **O. LII., rr. 1, 3, 4** - - C. A. 309
See Receiver.

—— **O. LIII., r. 4; O. LV.; O. LXI., r. 1** - 53
See Notice of Motion.

SALE OF BREAD—*Baker not provided with Scales and Weights—Delivery of Bread from a Cart at a Customer's House pursuant to general Order—6 & 7 Wm. 4, c. 37, s. 7.*] By 6 & 7 Wm. 4, c. 37, s. 7, "every baker or seller of bread . . . . who shall convey or carry out bread for sale in and from any

SALE OF BREAD—*continued.*
cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage, a correct beam and scales with proper weights . . . and in case any such baker or seller of bread . . . shall, at any time, carry out or deliver any bread without being provided with such beam and scales, with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay" a sum of money.—The appellant, a baker, delivered bread from a cart at a customer's shop pursuant to a general order given some time previously: he was then unprovided with scales and weights:—*Held*, that he had committed an offence against the foregoing enactment. ROBINSON *v.* CLIFF - - - - - **D. C. A. 294**

SALMON FISHERY—*Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109), *s.* 21—*Forfeiture of Net.*] By s. 21 of 24 & 25 Vict. c. 109, "No person shall fish for, catch, or kill by any means other than a rod and line any salmon between 12 o'clock at noon on Saturday and 6 o'clock on Monday morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or moveable instrument used by him in taking the same."—The respondents fished for salmon with a net during the prohibited hours, but they did not catch any fish:—*Held*, that the net having been used for the purpose of taking salmon, it had become forfeited. RUTHER *v.* HARRIS - - - - - **D. C. A. 97**

SALMON FISHERY ACT, 1861, s. 21 - **97**
See SALMON FISHERY.

SANITARY ACT, 1866 - - - **67**
See SMOKE. 1.

SCHOOL BOARD—*Bye-laws—Attendance of Child at School—Child employed in Workshop—Workshop Regulation Act*, 1867 (30 & 31 *Vict. c.* 146), *s.* 14—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.] By the Workshop Regulation Act, 1867, s. 14, every child "employed in a workshop shall attend school for at least ten hours in every week." By the Elementary Education Act, 1870, s. 74, every school board may make bye-laws. The school board for B. by its bye-laws directed that the parents of every child should cause him to attend a school during the whole time it should be open for instruction, but that nothing in the bye-laws should have any effect in so far as it might be contrary to anything contained in any Act for regulating the education of children employed in labour. The respondent's child was employed in a workshop at B. and attended a school pursuant to the provisions of the Workshop Regulation Act, 1867, s. 14, but did not attend the school during the whole time that it was open for the instruction of children, as was required by the bye-laws:—*Held*, that the bye-laws were not contrary to the Workshop Regulation Act, 1867, and were capable of being enforced, and that the respondent had committed a breach of them. BURY *v.* CHERRYHOLM [D. C. A. 457

SERVICE OF WRIT—Partners - - **50**
See WRIT UNDER BILLS OF EXCHANGE ACT.

SERVICE OUT OF THE JURISDICTION—*Practice—Service of Notice of Writ out of Jurisdiction*

SERVICE OUT OF THE JURISDICTION—*cont.*
—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 19—*Judicature Act, Order II., Rule* 4; *Order XI., Rules* 1 *and* 3—*Liability of foreign non-resident Corporation to be sued.*] Under the Judicature Act, Order XI., Rule 1, as under the Common Law Procedure Act, 1852, s. 19, where the defendant is a foreigner out of the jurisdiction, notice of writ must be served, and not the writ itself.—Whether a foreign non-resident corporation can or cannot be served with process, there is nothing to prevent the issue of a writ against it. WESTMAN *v.* AKTIEBOLAGET EKMANS MEKANISKA SNICKAREFABRIK - **237**

2. —— *Practice—Service of Writ out of Jurisdiction—Pleading to Jurisdiction—Rules of Court*, 1875, *Order II., Rules* 4, 5; *Order XI., Rules* 1, 3.] The question whether the subject-matter of an action is such that service of a writ out of the jurisdiction ought to be allowed under the Rules of Court, 1875, Order XI., is a question for the decision of a judge at chambers, subject to appeal, and the defendant cannot raise it by statement of defence. PRESTON *v.* LAMONT - - **361**

SEWER—New street - - **395, 400**
See REPAIR OF ROAD. 3, 4.

—— Recovery of expenses—Limitation **C. A. 514**
See REPAIR OF ROAD. 5.

—— Nuisance—Poisonous gas - - **196**
See NUISANCE IN SEWER.

SHERIFF—Execution—Right to sell - **299**
See EXECUTION CREDITOR. 2.

—— Poundage - - - - **146**
See EXECUTION CREDITOR. 1.

SHIP—Detention—Damages - - **60**
See DEMURRAGE.

—— Insurance—Termination of risk **81, C. A. 141**
See TERMINATION OF RISK.

SLANDER—*Words spoken of an Assistant to a Trader—Injury to Business resulting therefrom—Special Damage—General Evidence of Loss of Trade.*] Action by a trader charging that the defendant falsely and maliciously spoke and published of the wife of the plaintiff, who assisted him in his business, and in relation to such business, certain words charging her with having committed adultery upon the premises where the plaintiff resided and carried on business, whereby the plaintiff was injured in his business, and certain specified persons and others who had theretofore dealt with him ceased to do so:—*Held*, that the action was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop:—*Held*, also, that special damage might be proved by general evidence of the falling off of the plaintiff's business, without shewing who the persons were who had ceased to deal with the plaintiff, or that they were the persons to whom the statements were made. RIDING *v.* SMITH **91**

SMOKE—*Nuisance—Sending forth Black Smoke—Orders of Abatement and Prohibition—Conviction under separate Orders for the same Matter—Nuisances Removal Act*, 1855 (18 & 19 *Vict. c.* 124) —23 & 24 *Vict. c.* 77, *s.* 13—*Sanitary Act*, 1866 (29 & 30 *Vict. c.* 90).] Black smoke having issued from a chimney in such quantities as to be a

SMOKE – *continued.*
nuisance, an order of abatement was made under the Nuisances Removal Act, 1855, and the Sanitary Act, 1866; subsequently, black smoke having again issued from the chimney, an order was made upon the complaint of the respondent, under 23 & 24 Vict. c. 77, s. 13, prohibiting the recurrence of the nuisance. Two informations having been laid, one in respect of each order, but both founded on the same act of emission of black smoke:—*Held*, that the act complained of being the same in each case, there could not be two convictions in respect of it. Eddleston *v.* Barnes [67

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 343—*Liability under repealed Enactment—Prohibition of Recurrence of Nuisance.*] By s. 343 of 38 & 39 Vict. c. 55, which came into force on the 11th of August, 1875, 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, are repealed, with a proviso that "this repeal shall not affect any right or liability acquired, accrued, or incurred under any enactment hereby repealed."—An order under 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, to discontinue the sending forth of black smoke from a certain chimney in such quantity as to be a nuisance was made by justices and served on the respondent on the 24th of May, 1875. On the 12th of August, 1875, black smoke was emitted from the chimney in such quantity as to be a nuisance. The respondent having been summoned before justices for a disobedience of the order, they dismissed the summons upon the ground that the statutes under which the order was made had been repealed on the 11th of August:—*Held*, that the order was a "liability" within the proviso in 38 & 39 Vict. c. 55, s. 343, that it continued in force notwithstanding the repeal of the statutes under which it was made, and that the decision of the justices was erroneous. Barnes *v.* Eddleston – – D. C. A. 102

SOLD-NOTE—Broker—Personal liability
See Contract by Agent. [C. A. 357

SOLICITOR—Appointment—Company – 20,
See Articles of Association. [C. A. 88

STAMP DUTY—*Revenue—Foreign Security issued in the United Kingdom*—34 *Vict. c.* 4, *s.* 2.] A company, duly incorporated under the laws of the United States of America, and having its chief seat of business at New York, invited tenders for bonds of the value of $2,000,000, which were tendered for and purchased by a firm in New York, where the purchase-money was paid, and the bonds handed over, the name of the payee being left blank. The bonds were then sent to England, and advertised for sale there by the agents of the purchasers, who issued prospectuses, letters of allotment, and scrip certificates, and delivered the bonds to purchasers:—*Held*, that the issue of the bonds was completed at New York, when the company parted with the possession of and control over them, and that they were not therefore foreign securities issued in England, within the meaning of 34 Vict. c. 4, s. 2, so as to be liable to stamp duty. Grenfell *v.* The Commissioners of Inland Revenue – – 242

STATUTE – Construction—"Town" – 464
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—— Implied repeal – – – – 411
See Repeal of Statute.
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STATUTE OF FRAUDS, s. 6 – C. A. 110
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STATUTES:
29 Car. 2, c. 3, s. 6 – – C. A. 110
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11 Geo. 4 & 1 Wm. 4, c. 70, s. 4 – – 102
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5 & 6 Wm. 4, c. 50, s. 78 – – – 277
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6 & 7 Wm. 4, c. 37, s. 7 – – – 296
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1 & 2 Vict. c. 43, s. 29 – – – 269
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1 & 2 Vict. c. 45, s. 1 – – – 102
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2 & 3 Vict. c. 47, s. 60, subs. 7 – – 349
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2 & 3 Vict. c. 71, s. 40 – – – 172
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3 & 4 Vict. c. 85, s. 6 – – – 411
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5 & 6 Vict. c. 35, s. 10, case 1, rule 3 – 233
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8 & 9 Vict. c. 109 – – – – 320
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11 & 12 Vict. c. 43, ss. 1, 11 – – 188
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11 & 12 Vict. s. 11 – – – C. A. 514
See Repair of Road. 5.
11 & 12 Vict. c. 63, s. 69 – – – 336
See Repair of Road. 3.
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See Repair of Road. 5.
13 & 14 Vict. c. 61, s. 22 – – – 416
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14 & 15 Vict. c. 36, s. 2. – – – 151
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15 & 16 Vict. c. 76, s. 19 – – – 237
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—— —— ss. 180, 207 – – – 31
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16 & 17 Vict. c. 34, s. 2, sched. D – 428
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16 & 17 Vict. c. 51, ss. 2, 4 – – 204
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16 & 17 Vict. c. 97, ss. 1, 2, 55, 132 - 151
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16 & 17 Vict. c. 119, s. 3 - - 320
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17 & 18 Vict. c. 31, s. 7 - - - 217
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17 & 18 Vict. c. 36 - - C. A. 285
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23 Vict. c. 27, s. 6 - - - C. A. 385
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23 & 24 Vict. c. 77, s. 13 - - - 67
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23 & 24 Vict. c. 126, ss. 14, 17 - - 75
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24 & 25 Vict. c. 109, s. 21 - - - 97
See Salmon Fishery.

24 & 25 Vict. c. 61, s. 24 - - C. A. 514
See Repair of Road. 5.

25 & 26 Vict. c. 22, s. 13 - - - 100
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25 & 26 Vict. c. 102, ss. 44, 52, 112 - 400
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26 & 27 Vict. c. 33, s. 20, subs. 1 - 100
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28 Vict. c. 86, s. 16 - - - 376
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29 & 30 Vict. c. 90 - - - - 67
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30 & 31 Vict. c. 142, s. 7 - - - 48
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30 & 31 Vict. c. 146, s. 14 - - 457
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31 & 32 Vict. c. 119, s. 16 - - - 217
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32 & 33 Vict. c. 67, ss. 45, 76 - C. A. 469
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32 & 33 Vict. c. 71, s. 6, subs. 2 - Ex. Ch. 62
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34 & 35 Vict. c. 43, ss. 29, 53 - - 107
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35 & 36 Vict. c. 94 - - C. A. 124, 265
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36 & 37 Vict. c. 66, ss. 18, 45 - - 408
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37 & 38 Vict. c. 49 - - C. A. 124, 265
See Covenant not to affect Licence.

37 & 38 Vict. c. 54, ss. 7, 8, 13 - - 310
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38 & 39 Vict. c. 50, s. 6 - - - 404
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38 & 39 Vict. c. 55, ss. 91, 94, 95 C. A. 344
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38 & 39 Vict. c. 77, s. 11, subs. 2 - 102
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38 & 39 Vict. c. 90, s. 4 - - - 179
See "Dispute."

STATUTORY DUTY—*Duty to be enforced by Injunction—Remedy by Action for Injury sustained by Breach—Forest of Dean Act, 1 & 2 Vict. c. 43, s. 29.*] The statute 1 & 2 Vict. c. 43, and the rules made under it, regulate the use of adjoining mines in the Forest of Dean. By s. 29, compliance with the rules may be enforced by injunction of the Court of Exchequer, or otherwise in such manner as that Court shall on application think fit. The plaintiffs and the defendant were holders of adjoining mines, and the former brought an action for injury sustained by them through the stopping of the engines in the defendant's mine contrary to one of the rules. On demurrer:—*Held*, that the specific remedy provided by s. 29 for enforcing the rules did not exclude the right of action for injuries caused by a breach of them. Ross *v.* Rugge-Price - - - - 269

SUCCESSION DUTY—*Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38—Allowance for Loss of Annuity on Succession—Deprivation of Property on taking Succession.*] The tenant for life in possession and his son the tenant in tail in remainder of real estates, by a disentailing deed in 1869, conveyed the estates to such uses as they should jointly appoint; and by a deed of even date in consideration of the son's intended marriage, appointed the estates to the use of trustees in fee from and after the marriage by way of mortgage to secure 20,000*l.*, subject to a proviso that if the father or son, or any person interested in the equity of redemption, should on a day named in 1870, pay to the trustees 20,000*l.*, with interest at 3*l.* per cent., the trustees should at any time on request reconvey the estates to the uses to which the equity of redemption should then stand settled; and the father covenanted that if the marriage was solemnized he would, so long during his life as the 20,000*l.* or any part should remain due to the trustees on the security of the deed, pay the trustees interest thereon at 3*l.* per cent.; provided that if he should pay the interest

SUCCESSION DUTY—*continued.*

half yearly the trustees should not during his life call in the 20,000*l.* or any part; and the deed witnessed that the trustees should stand possessed of the 20,000*l.* upon the trusts declared by the marriage settlement of even date, viz. upon trust to pay the annual income thereof to the son for life, and after his decease to his wife for life, with the usual trusts over for children.—The marriage was solemnized, and the son received under the deeds 600*l.* a year, being the interest on 20,000*l.* at 3*l.* per cent., until his father's death in 1874, when he became entitled in possession to the estates, and the 600*l.* a year ceased:—*Held* (affirming the judgment of the majority of the Court of Exchequer), that the case was covered by the principle of *Commissioners of Inland Revenue* v. *Harrison* (Law Rep. 7 H. L. 1), and that on taking his succession to the estates the son was "bound to relinquish," or was "deprived of" the 600*l.* a year within s. 38 of the Succession Duty Act, 1853, and was entitled to an allowance accordingly, upon the computation of the assessable value of his succession. Le Marchant *v.* The Commissioners of Inland Revenue - C. A. 185

2. —— *Predecessor—Power of Appointment—Succession Duty Act*, 1853, *ss.* 2, 4.] That part of s. 4 of the Succession Duty Act, 1853, which relates to making an appointment under a general power, does not apply to a case where the power can only be exercised during the life of the person whose death causes the succession.—S., tenant for life in possession, and W., his eldest son, tenant in tail male in remainder of estates, by deed dated the 22nd of March, 1854, barred the entail, and settled the estates to such uses as they should jointly appoint. By deed, dated the 23rd of March, 1854, in exercise of that joint power, they appointed the estates (in the event which happened) to the use that W. should, during the joint lives of himself and S., receive a yearly rent-charge, and subject thereto to S. for life with remainder to W. for life, with remainder to the first and other sons of W. in tail male, with remainder to such uses as S. and his second son T. should jointly appoint. W. died a bachelor, in 1864. By deed in 1866, S. and T., in exercise of the above joint power, appointed the estates (subject to S.'s life estate and in the events which happened) to the use that after the decease of S., A., his wife, should, if she should survive him, receive a yearly rent-charge of 1700*l.*, and subject thereto, that the estates should go to the use of D., the daughter of T., during so much of a certain period as she should live. S. died in 1873, leaving A. his survivor; and D., who was unborn on the 23rd of March, 1854, and was still an infant, came into possession of the estates:—*Held*, that, for the purpose of assessing the duties payable respectively by A. und D., their successions were derived, within the meaning of s. 2 of the Succession Duty Act, 1853, from S. and T., as joint "predecessors," the donees of the general power of appointment; and not from W., the donor of the power.—The Crown having thereupon contended that since the joint power limited to S. and T., on the death of W., and failure of his issue male, was exercised by S. and T. by the deed of 1866, the case fell within s. 4. and S. and

SUCCESSION DUTY—*continued.*

T. must be deemed to have been entitled jointly at the time of exercising the power to the property thereby appointed as a succession derived from W., the donor of the power; and that an additional duty attached thereon, which must be calculated as to one moiety upon the relationship of S. to W., and on the other moiety upon the relationship of T. to W.:—*Held*, that the case did not fall within s. 4, the power being one which, from its nature, could only be exercised during the life of S., the person whose death caused the succession, and that no additional duty was payable.—*Lord Braybrooke* v. *Attorney General* (9 H. L. C. 150; 31 L. J. (Ex.) 177), and *Attorney General* v. *Floyer* (9 H. L. C. 477; 31 L. J. (Ex.) 404), distinguished. The Attorney General *v.* Charlton - - - 204

SUPPORT—*Grant of Land reserving Minerals—Right to work Minerals, paying Compensation for Damage—Enforcing Claim for Compensation—Easement—Right to Support.*] The owner in fee of an estate granted away a portion of it, which ultimately became the property of the plaintiff, but reserved a rent-charge (subsequently redeemed), and also the minerals under the land so granted and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land. The grantee (for the better securing of the rent-charge) covenanted to build a mill on the land granted to him. The owner in fee afterwards granted to the defendants' predecessor in title the minerals, rights, and liberties so reserved, and also the other and adjacent portion of the estate. The defendants, who took with notice of the agreement as to the payment of compensation, worked the minerals under the plaintiff's land, and also the minerals under their own land, and by the operation of one or other of these workings, or by their joint operation, let down the surface of the plaintiff's land, and so injured the mill which had been built there in accordance with the covenant:—*Held*, affirming the decision of the Court below, first, that the right to work the subjacent mines being subject to the condition of paying compensation, the plaintiff could maintain an action for the injury done to the mill by the working of those mines.—Secondly, that if the injury arose from the working of the mines under the adjacent lands, or from the combined effect of working those mines and the subjacent ones, the plaintiff was still entitled to recover. Aspden *v.* Seddon. Preston *v.* Seddon - C. A. 496

SURETY—Guarantee of whole debt C. A. 157
See Guarantee of whole Debt.

—— Leave to defend action - - 262
See Writ specially indorsed.

SURFACE—Support—Minerals - C. A. 496
See Support.

TERMINATION OF RISK—*Marine Insurance—Voyage from Liverpool to Baltimore and United Kingdom—Leave to go to Antwerp—Ultimate Destination of Ship—Arrival at Port—Usual Place of Discharge—Intention to insure against unascertained Risk.*] The risk on a vessel under a policy of insurance to a place generally, without any provision as to her safety there, continues until

TERMINATION OF RISK—*continued.*
she is anchored at her port of destination, in the usual place for discharge of her cargo—By a memorandum indorsed on a policy made by way of re-insurance on a vessel from Liverpool to Baltimore and United Kingdom, the vessel, in consideration of an additional premium, was to be at liberty to go to Antwerp. On leaving Baltimore she went direct to Antwerp, where she arrived the day before the memorandum was made. Two days after, while in the outer dock, on her way into the inner dock, the usual place of discharge, she was ordered to Leith, on her way to which place she was lost. In an action on the policy or for a return of the additional premium:—*Held*, that the memorandum did not give liberty to touch or call at Antwerp, and so did not permit the vessel to go to Antwerp, and thence to England; and that, as the vessel had not, when the memorandum was made, reached the usual place of discharge, the voyage was not then at an end, and the additional premium could not be recovered back. Stone *v.* The Marine Insurance Company, Ocean Limited, of Gothenburg - 81

2. —— *Ship and Shipping—Marine Insurance—Voyage Policy and Time Policy combined—Insurance on Ship "to Port, and for fifteen Days whilst there after arrival"—Deviation.*] A ship insured "at and from the port of Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle on the 4th of December, and on the 13th completed the discharge of her inward cargo within the port of Newcastle. Having been chartered to load in the river Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as a stiffening, the ship was moved on the 15th of December to a loading place on the Tyne, within the port of Newcastle, there to complete her loading. Whilst moored there she was, on the 16th, injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. The policy did not contain the usual twenty-four hours' clause:—*Held*, reversing the judgment of the Exchequer Division, that the policy must be construed as a voyage policy with a time policy engrafted upon it, and that, although the voyage was terminated and the inward cargo discharged, the underwriters were liable. Gambles *v.* The Ocean Marine Insurance Company of Bombay [C. A. 141

"TOWN"—*Statute—Construction.*] By a Local Act passed in 1822 it was enacted that no person should sell any fish within the "town" of R. except in the market-places thereof, and that any person offending against this provision should forfeit a sum of money. In 1876 the respondent sold fish in M. street, which then was a main thoroughfare of the town of R.; but in 1822 its site was green fields; M. Street was not within the market-places of R.:—*Held*, that the word "town," as used in the Local Act, meant the collection of buildings from time to time called the town of R., and that the respondent had been guilty of an offence against that Act. Collier *v.* Worth - - - - D. C. A. 464

TRADER—Act of bankruptcy—Execution - 146
See Execution Creditor. 1.

TRANSFER OF ACTION—*Judicature Act*, 1873, *ss.* 31, 34, 36, 39—*Judicature Act*, 1875, *s.* 11, *subs.* 2—*Order LI., Rule* 2—*Order LIV., Rule* 2—*Jurisdiction of a Judge at Chambers*—11 *Geo.* 4 *& 1 Wm.* 4, *c.* 70, *s.* 4—1 *& 2 Vict. c.* 45, *s.* 1—*Transfer of Actions—Jurisdiction of Judge of one Division to transfer Actions assigned to another Division—Counter-claim for Specific Performance of Contract for Lease.*] The effect of ss. 31, 39 of the Judicature Act, 1873, and s. 11, subs. 2, of the Judicature Act, 1875, taken together with Order LI., Rule 2, and Order LIV., Rule 2, is that any judge of the Queen's Bench, Common Pleas, or Exchequer Division, sitting at chambers, has jurisdiction to order that an action assigned to one of those Divisions be transferred to the Chancery Division, though he is not a judge of the Division to which the action is assigned.—To an action in the Exchequer Division to recover possession of land, the defendant set up a counter-claim for specific performance of a contract for a lease. Upon a summons taken out in that Division by the defendant, and against the plaintiff's will, a judge of the Common Pleas Division at chambers made an order to transfer the action to the Chancery Division, the Lord Chancellor's consent having been obtained:—*Held*, that since it appeared on the facts that there was a primâ facie case for specific performance, which, under the practice before the Judicature Acts, would have entitled the present defendant on a bill for specific performance to an injunction to restrain the action, and since the question of specific performance could be more conveniently disposed of in the Chancery Division, the action ought to be transferred.—*Quære*, whether the defendant was entitled to the transfer upon merely setting up the counter-claim, and without verifying it.—*Held*, also (by Amphlett and Huddleston, BB., Kelly, C.B., dubitante), that the learned judge, though not a judge of the Exchequer Division, had jurisdiction, under the Judicature Acts and Rules of Court, 1875, to make the order for transfer.—*Held*, also (by Huddleston, B.), that the learned judge had jurisdiction under 11 Geo. 4 & 1 Wm. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 1, taken together with the Judicature Acts and Rules of Court, 1875. Hillman *v.* Mayhew - - - 132

TRESPASS—*Asportation—Goods of Deceased—Executor.*] A near relative of a deceased person being in the house at the death, removed some jewelry of the deceased from one room to another. The executor having brought trespass for this asportation, the jury found that the defendant removed the goods bonâ fide for their preservation:—*Held*, that this was no answer to the action.—*Semble*, per Bramwell and Amphlett, BB., that if the defendant had proved not merely that the interference was made bonâ fide for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner, this would have constituted a good defence. Kirk *v.* Gregory - - - - 55

TRIAL—County Court—Remitting action - 48
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VALUATION METROPOLIS ACT, 1869, ss. 45, 76
See Inhabited House Duty. [C.A. 469

VESTING ORDER—Annulling Bankruptcy 44
See Annulling Bankruptcy.

WAGER—Cheque for share of winnings - 13
See Gaming.

WARRANT OF ARREST—*Arrest—Warrant—Offence less than Felony.*] When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.—The appellant was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to a summons, a warrant was issued for his apprehension. The respondent, being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him:—*Held*, that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty. Codd *v.* Cabe - - - D. C. A. 352

WATERCOURSE—*Nuisance — Watercourse "belonging" to River — Artificial Stream — "Wilfully."*] 14 Geo. 3, c. 96, which was passed for improving the navigation of certain rivers, enacted that "if any person or persons shall wilfully throw any soil .... into any part of the said rivers .... or of any drains, trenches, or watercourses thereunto belonging, every such person shall for every such offence forfeit" a sum of money.—The appellant was a tanner, having premises on a small natural stream at a point about four miles from one of the rivers, into which it flowed at a place where that river was navigable: in the course of his business he discharged refuse from his works into the natural stream: he was convicted by a stipendiary magistrate of an offence against the foregoing enactment:—*Held*, that the words "drains, trenches, or watercourses thereunto belonging" applied only to artificial streams made for the purpose of improving the navigation of the rivers, and did not apply to natural streams, and therefore that the conviction was wrong.—*Held*, also (per Bramwell, B.), that inasmuch as the appellant discharged the refuse in the course of his business, he did not "wilfully" throw it into the stream within the meaning of the statute. Smith *v.* Barnham [D. C. A. 419

WILL—Revocation of clause - C. A. 110
See Revocation of Will.

WORDS—"Adjoining" - - - 336
See Repair of Road. 2.

—— "Belonging to river" - - - 419
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See Dispute.

—— "Entertainment" - - C. A. 385
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—— "Street" - - - - 395
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—— "Town" - - - - - 464
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WRIT SPECIALLY INDORSED—*Leave to defend—Surety or Guarantor—Judicature Acts, Order III., Rule* 6; *Order XIV., Rules* 1, 6.] The power given by Order XIV., Rule 1, to a Court or judge, where the defendant has appeared to a specially indorsed writ of summons, to allow the plaintiff to sign final judgment, is intended to be exercised where it is shewn, either from the acknowledgment of the debt by the defendant or from other circumstances, that the defence would be for mere purposes of delay.—In an action against a surety on a specially indorsed writ it was not shewn that the debt had been acknowledged by the principal debtor, or that particulars had been furnished to the defendant, or that he had admitted his liability:—*Held*, that the defendant might reasonably call on the plaintiff to prove his claim, and should be allowed to defend without paying money into Court or giving security. Lloyd's Banking Company *v.* Ogle - - - - - 262

WRIT UNDER BILLS OF EXCHANGE ACT—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *Sched. Order II., Rule* 6; *Order IX., Rules* 2, 6—*Practice—Procedure under Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67)—*Signing Judgment—Personal Service—Partners sued as Firm.*] The effect of the Judicature Act, 1875, Sched. Order II., Rule 6, is that in actions under the Bills of Exchange Act, 1855, the procedure provided by s. 1 of the Bills of Exchange Act must be strictly observed, and the plaintiff cannot sign final judgment in default of appearance without filing an affidavit of "personal service." He cannot for that purpose avail himself of Order IX., Rule 6, which provides that where partners are sued in the name of the firm service upon one partner shall be deemed good service upon the firm; nor can he obtain an order for substituted service under Order IX., Rule 2. Pollock *v.* Campbell Brothers - - 50

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